Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

NANCY ALEXANDER, et al.,
Petitioners,

v.

BOSCH AUTOMOTIVE SYSTEMS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

C. Mark Pickrell
Counsel of Record
Waller Lansden Dortch & Davis, LLP
511 Union Street; Suite 2700
Nashville, TN 37219
(615) 850-8913

Counsel for Petitioners

January 3, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. § 1132(a)(3), provides that a "civil action may be brought . . . by a participant . . . to obtain other appropriate equitable relief . . . to redress . . . violations" of the Act.

The Question Presented is:

Does Section 502(a)(3) of ERISA authorize a district court to order a reinstatement to employee benefits as "other appropriate equitable relief" for an employer's admitted violation of the Act?

PARTIES TO THE PROCEEDING

Petitioners:

Nancy Alexander, an individual.
Mildred Clark, an individual.
William Green, Jr., an individual.
Annette Hall, an individual.
Larry Herald, an individual.
Dorothy Holman, an individual.
Roy Homan, Jr., an individual.
Herbert Hughes, an individual.
Joe Joyner, an individual.
Harold David Lester, an individual.
Judy Lyles, an individual.
Ron Marsh, an individual.
Mary Pennington, an individual.
Cammie Prock, an individual.
Willie Rogan, an individual.
Janice Rogers, an individual.
Daniel Rumble, an individual.
Jimmy Scott, an individual.
Susan Scott, an individual.
Marcia Scruggs, an individual.
Paul Sheppard, an individual.
Danny Slayton, an individual.
Dorothy Staten, an individual, and as Administratrix of the Estate of Willie Staten.
Bill Turner, an individual.
Robert Washington, an individual.
Jerrie Witherspoon, an individual.
Charles Wix, an individual.
Wilson Woodmore, an individual.
Rose Woods, an individual.
Gerald Woodward, an individual.

John Jones, an individual.
Ernest Clay, an individual.
Debora Strouce, an individual.
Dennis Crews, an individual.
Mark Helm, an individual.

Respondent:

Bosch Automotive Systems, Inc., a publicly-traded corporation.

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The opinion of the court of appeals is not reported in West's Reporter Series but is unofficially reported at 232 Fed. Appx. 491, 2007 WL 1424299 (6th Cir. May 14, 2007), and 40 Employee Benefits Cas. 2245 (6th Cir. 2007). The opinion of the court of appeals is located in the Appendix, Vol. II to the Petition, at 1a.

The opinion of the district court is an unreported decision. The judgment of the district court is located in the Appendix, Vol. II to the Petition, at 26a. The district court's findings of fact and conclusions of law, pronounced from the bench at the conclusion of the trial and included by reference in the court's judgment, are located in the Appendix, Vol. II to the Petition, at 28a.

JURISDICTIONAL STATEMENT

The court of appeals filed its opinion in this case on May 14, 2007. Petitioners filed a timely petition for rehearing *en banc* on May 29, 2007. The court of appeals denied the petition for rehearing on October 5, 2007. (Appendix, Vol. II to the Petition, at 39a.)

The Court possesses jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254 (2001 & Supp. 2007).

STATUTORY PROVISIONS INVOLVED

Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 93-406, Title I, § 510, 88 Stat. 895, codified at 29 U.S.C. § 1140 (2001

& Supp. 2007), makes it unlawful to "discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary [of an employee benefit plan] . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." For such a violation, Section 510 provides: "The provisions of section 502 [29 U.S.C. § 1132] of this title shall be applicable in the enforcement of this section."

Section 502(a)(3) of ERISA, Pub. L. 93-406, Title I, § 502(a)(3), 88 Stat. 891, codified at 29 U.S.C. § 1132 (2001 & Supp. 2007), provides:

> (a) A civil action may be brought –
>
> . . .
>
> (3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce an provisions of this subchapter or the terms of the plan . . . .

STATEMENT OF THE CASE

In 1995, Bosch Automotive Systems, Inc. ("Bosch"), the respondent, operated an electric-motor plant in Hendersonville, Tennessee. Bosch operated the plant in three shifts, and the hourly employees at the plant were represented by the United Auto Workers. (Trial. Tr. at 316.) The plant was losing money. (*Id.* at 345-46.) Bosch management developed "Project Flag" to determine how to close the plant. (*Id.* at 345-48.) Bosch decided to minimize the cost of benefits upon a

plant-closing and decided to time the layoff of employees and the closing of the plant in order to minimize the number of employees entitled to plant-closing benefits. (*Id.* at 350-55.)

Prior to negotiating its 1997 collective-bargaining agreement with the United Auto Workers, Bosch told the union that the plant was losing money and that Bosch intended to close the plant. (*Id.* at 376.) Bosch and the UAW entered into a collective-bargaining agreement in July 1997. (*Id.*) Because the workers at the plant were concerned that the plant might be shut down, they negotiated specific plant-closing benefits (regarding medical benefits and pensions) in the event that the plant was closed, or 70% of the employees were laid off or terminated within any 12-month period (a "constructive" plant closure). (*Id.* at 377.) The collective-bargaining agreement also provided that Bosch would inform the union when it made the decision to close the plant, and it required Bosch to give at least six months' notice prior to actually shutting down the plant. (*Id.* at 385.)

In 1998, Bosch laid off one third of the workers – those on the third shift. (*Id.* at 217.)

In December 1998 and January 1999, Bosch management met to plan the timing of the closing of the Hendersonville plant. (*Id.* at 40, 290.) Bosch initially planned to lay off the second shift in July 1999, with a closure of the plant within twelve months. (*Id.* at 291.) Bosch hired an outside consulting firm, Towers Perrin, to determine the various benefit costs of closing the plant, depending on the timing of a layoff of the second shift and the timing of the plant closing.

(*Id.* at 43.) The financial analysis of Bosch's outside consultants showed that Bosch would incur benefit costs of approximately $3.4 million if the second shift were entitled to plant-closing benefits, consisting of $1.3 million in pension liabilities and $2.1 million in medical liabilities. (*Id.* at 65-69.)

Bosch decided to lay off half of the remaining workers (those on the second shift), wait over six months to announce the plant closing, and then close the plant after twelve months had elapsed following the layoff of the second-shift workers. (*Id.* at 51.) By doing this, Bosch sought to minimize the plant-closing benefits that it would have to pay upon a closure of the plant. (*Id.* at 47.) As Nancy Duffy, Bosch's benefits manager, testified, "Bosch needed to have the timing of the closing set to minimize the number of employees eligible for benefits." (*Id.* at 64.)

Bosch originally planned to lay off the second-shift workers in June 1999. (*Id.* at 42, 224.) That way, Bosch would not need to renegotiate the 1997 collective-bargaining agreement, which expired in July 2000. (*Id.* at 237-38.) Bosch needed to make sure, however, that it had adequate inventory to be able to lay off the second shift and make the transition to manufacturing electric motors in Bosch's plant in Mexico. (*Id.* at 227.) Bosch could not meet its inventory requirements if it laid off the second shift in the summer of 1999. (*Id.* at 227-28.) Bosch increased its production in the spring and summer of 1999 (through overtime work), so that: 1) its inventory could be increased to cover its layoff of the second-shift workers and transition the entire line to Mexico; and 2) the level of inventory would be high enough that a

transition of work to Mexico could take at least twelve months – so that the second-shift workers could be deprived of plant-closing benefits under the 1997 collective-bargaining agreement. (*Id.* at 238-43.)

In October 1999, having reached a level of inventory that would last over twelve months, Bosch laid off approximately 69 second-shift workers.[1] (*E.g.*, *Id.* at 243.) Bosch's stated reason for the layoff was lack of work. (*E.g.*, *Id.* at 94.) Overtime work was still available at the plant, however, even though total overtime worked at the plant was reduced by 50%. (*Id.* at 252.)

On October 13, 1999, Bosch held a meeting for the second-shift workers, at which the impending layoff was announced. At the meeting, Nancy Duffy was specifically asked whether the laid-off workers would be entitled to plant-closing benefits. (*Id.* at 57.) Duffy told the workers that she did not know. (*Id.*) As one laid-off worker testified, Duffy told the workers at the meeting that Bosch had not decided on closing the plant. (*Id.* at 94.) The second-shift workers were laid off on October 29, 1999. (*Id.* at 90.)

One worker, Gerald Woodward, asked in writing if the second shift would be entitled to plant-closing benefits. (*Id.* at 50.) Bosch informed Woodward that no date had been set for closing the plant. (*Id.* at 52-54.)

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[1] Two of the plaintiffs, although on the second shift, were not laid off in October 1999, because they had a protected status. (Trial Tr. at 154.)

In April of 2000, Nancy Duffy calculated the benefit costs of different closing times; Duffy was told "not to share these calculations with anyone outside of [the] management group." (*Id.* at 61-63.) That same month, Duffy was concerned that she would have to divulge Bosch's plans under oath during a workers' compensation proceeding, and she corresponded with Bosch's counsel to voice her concerns about revealing Bosch's plans. (*Id.* at 83-86.)

On May 11, 2000, Bosch announced that it was closing the Hendersonville plant in November 2000, just over twelve months after the layoff of the second shift. (*Id.* at 96.)

In November 2000, just more than twelve months after laying off the second-shift workers, Bosch closed down operations in the Hendersonville plant and transferred its manufacturing line to Mexico. (*Id.* at 270-71.)

On January 17, 2001, thirty-six individual plaintiffs (now petitioners) sued Bosch for violations of Sections 502 and 510 of the Employee Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. §§ 1132, 1140, in the United States District Court for the Middle District of Tennessee.[2] The district court possessed jurisdiction pursuant to 28 U.S.C. § 1331 (2007).

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[2] The plaintiffs also sued the United Auto Workers for lack of representation, but that claim was settled during the pendency of the plaintiffs' claims against Bosch.

Bosch moved to dismiss plaintiffs' claims because of an alleged failure to file suit within the applicable statute of limitations. (Motion for Summary Judgment, R. 11.) The district court rejected Bosch's statute-of-limitations defense. (Order, R. 36 (relying upon the federal discovery rule).)

The district court conducted a trial of the plaintiffs' Section 510 claims on May 23, 24, and 25, 2005.[3] At the conclusion of defendant's case, the district court announced its findings of fact and conclusions of law. (Appendix, Vol. II to the Petition, at 28a (in pertinent part).) The district court found that Bosch's decision to lay off the second-shift employees in October 1999 was motivated by the intent to avoid paying plant-closure benefits under the 1997 collective-bargaining agreement. (*Id.* at 29a) The district court concluded that Bosch's discharge of the plaintiffs to avoid payment of benefits that, in the plain language of the statute, the plaintiffs "may become entitled to," constituted a violation of Section 510 of ERISA. (*Id.* 27a, 36a.)

The district court ordered Bosch to reinstate the plaintiffs to the benefits that they would have been entitled to, upon a plant closure, had Bosch not violated the law. (*Id.* at 27a, 37a.) Bosch objected to the district court's remedy and appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. (Notice of Appeal, R. 224.)

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[3] The district court rejected plaintiffs' Section 502 claims as a matter of law. (Memorandum Decision, R. 82.)

Bosch asserted three main issues initially on appeal: 1) Bosch did not violate Section 510 of ERISA; 2) the plaintiffs failed to file their complaint in a timely fashion under the applicable statute of limitations; and 3) the remedy imposed by the district court was not "appropriate equitable relief" as permitted by Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). *See Alexander v. Bosch Automotive Systems, Inc.*, 232 Fed. Appx. 491, 40 Employee Benefits Cas. 2245, 2007 WL 1424299 (6th Cir. May 14, 2007), Appendix, Vol. II to the Petition, at 6a-7a. Bosch conceded that it had violated Section 510 of ERISA at oral argument (Appendix, Vol. II to the Petition at 6a), and the court of appeals concluded that the plaintiffs filed their Complaint within the applicable statute of limitations. *Id.* at 11a. The court of appeals, however, also concluded that the remedy imposed by the district court for Bosch's violation of Section 510 was not authorized under Section 502(a)(3) of ERISA, reversing the judgment of the district court. *Id.* at 23a, 25a ("In sum, Plaintiffs are left without a remedy that falls under the rubric of 'appropriate equitable relief' as permitted under ERISA § 502(a)(3).").

Petitioners filed a timely petition for rehearing *en banc* on May 29, 2007. That petition was denied by an Order entered October 5, 2007. (Appendix, Vol. II to the Petition, at 39a.) This petition for a writ of certiorari followed.

ARGUMENT

This is an ERISA case. It involves the nature of the remedies authorized by Congress in Section 502(a)(3)

of the Act, codified at 29 U.S.C. § 1132(a)(3). Specifically, this case involves the question of whether a district court, in remedying a violation of the non-discrimination protections of Section 510 of the Act, codified at 29 U.S.C. § 1140 (2001 & Supp. 2007), may order that aggrieved ex-employees be reinstated to benefits that they have been deprived of by their employers' unlawful conduct.

Petitioners respectfully submit that the Court has already decided this issue, in the affirmative, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Subsequent cases of the Court, however, have cast doubt on the remaining viability of the specific holding in *Varity Corp.*, and a split among the courts of appeals has developed regarding the remedies currently available under Section 502(a)(3). Due to this circuit split, and the confusion about the lasting vitality of the Court's decision in *Varity Corp.*, the Court should grant the petition and issue a writ of certiorari to review the judgment of the court of appeals.

Importantly, the Court has already issued the writ and heard argument in a case, *LaRue v. DeWolff, Broberg & Assoc.*, 458 F.3d 359 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (2007)(No. 06-856), which presents one issue regarding the remedies available under Section 502(a)(3). It is possible, however, because the Court also granted certiorari regarding another provision of ERISA in *LaRue*, that the Court may not reach the Section 502(a)(3) issue in that case. If the Court does not reach the Section 502(a)(3) issue presented in *LaRue*, then this case squarely and cleanly presents that issue for the Court's consideration. Alternatively, if the Court does reach

the 502(a)(3) issue in *LaRue*, then the Court should grant the petition in this case, vacate the judgment of the court of appeals, and remand to the court of appeals for reconsideration in light of the Court's decision in *LaRue*. In either event, the petition should be granted.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS DIRECTLY WITH A PRIOR DECISION OF THE COURT, *VARITY CORP. v. HOWE*.

Section 510 of ERISA, 29 U.S.C. § 1140, provides, "It shall be unlawful for any person to *discharge*, fine, suspend, expel, discipline or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." Section 510 also provides, "The provisions of section 1132 of this title shall be applicable in the enforcement of this section."

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides:

> (a) A civil action may be brought –
>
> . . .(3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

After determining that Bosch violated Section 510 of the Act by discharging the plaintiffs, the district court in this case remedied Bosch's violation of the Act by reinstating the plaintiffs to the benefits that they would have been entitled to but for Bosch's unlawful conduct. (Appendix, Vol. II to the Petition, at 27a.) The court of appeals, however, rejected the district court's remedy by concluding that reinstatement of the plaintiffs to their lost benefits is not "appropriate equitable relief" under Section 502(a)(3). (Appendix, Vol. II to the Petition, at 23a, 25a). The Petitioners respectfully submit that the court of appeals' decision directly conflicts with the decision of the Court in *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

In *Varity Corp.*, the plaintiffs alleged that they were tricked by their employer to withdraw from their welfare-benefit plan and, thereby, forfeit their benefits. *Varity Corp.*, 516 U.S. at 491-92. The plaintiffs sought "an order that, in essence, would reinstate each of them as a participant in the employer's ERISA plan." *Id.* at 492. The district court determined that Section 502(a)(3) gave the employees "a right to 'appropriate equitable relief . . . to redress' the harm that [the employer's] deception had caused them individually." *Id.* at 494. The Eighth Circuit affirmed, and the Court affirmed. *Id.* at 494, 515.

In holding that a reinstatement to benefits is appropriate relief under Section 502(a)(3), the Court relied upon the structure of the statute (Congress' inclusion of Section 502 as a "catch-all" remedial provision), its legislative history (the remedial provisions "provide both the Secretary and participants and beneficiaries with broad remedies for

redressing or preventing violations of [ERISA]"), and its purpose. *Id.* at 512-13 (citing S. Rep. No. 93-127, p. 35 (1973), 1 Leg. Hist. 621; H.R. Rep. No. 93-533, at 17, 2 Leg. Hist. 2364). The Court concluded that, because Congress had provided the plaintiffs relief in no other section of the statute, reinstatement of them to their benefits was appropriate relief under Section 502(a)(3). *Id.* at 515. The Court stated, "We are not aware of any ERISA-related purpose that a denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." *Id.*

The decision of the court of appeals in this case directly conflicts with the Court's decision in *Varity Corp.* In *Varity Corp.*, the Court held that the plaintiffs *could* sue under Section 502(a)(3) for reinstatement to the benefit plan to which they would have been entitled but for the employer's violation of ERISA. The court of appeals in this case, to the contrary, held that the plaintiffs *could not* sue under Section 502(a)(3) for reinstatement to the benefit plan to which they would have been entitled but for the employer's violation of ERISA.

In declining to follow *Varity Corp.*, the court of appeals below asserted, "The Supreme Court [in *Varity Corp.*] did not consider the propriety of the Eight Circuit's remedy – ordering reinstatement of the plaintiffs into the welfare benefit plans – because the defendant conceded that issue on appeal before the Supreme Court." *Id.* The court of appeals' assertion regarding the Court's decision in *Varity Corp.* is incorrect, based on the Court's own opinion. In *Varity*

Corp., the Court specifically discussed and held that the district court's reinstatement-to-benefits remedy was appropriate equitable relief under ERISA. *Varity Corp.*, 516 U.S. at 514-15. In fact, the Court explained that it took the case in order to resolve whether "the proper interpretation of ERISA § 502(a)(3) . . . authorized the lawsuit *and relief* in this case." *Id.* at 495 (emphasis added). While it is certainly true that the parties in *Varity Corp.* understood a reinstatement-to-benefits remedy to be an equitable remedy (which it most certainly is), they disagreed about whether Congress authorized that remedy in ERISA. In *Varity Corp.*, the Court unequivocally held that Congress did authorize a reinstatement-to-benefits remedy in Section 502(a)(3). *Id.* at 508, 515.

Because the court of appeals' decision is diametrically opposed to the Court's interpretation of Section 502(a)(3), as applied to a reinstatement to benefits in *Varity Corp.*, the Court should grant the petition. Cf. Sup. Ct. R. 10(c)(certiorari appropriate when a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

II. THERE IS A CLEAR SPLIT AMONG THE COURTS OF APPEALS REGARDING THE NATURE OF THE RELIEF PERMITTED BY SECTION 502(a)(3).

The court of appeals' decision in this case conflicts directly with a decision of the United States Court of Appeals for the Ninth Circuit. In *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), the Ninth Circuit upheld an injunction that required an employer to

"modify its retirement plan records to reflect that the six plaintiffs were involuntarily terminated . . . and thus eligible for payment of a [specific termination] benefit." *Id.* at 1176, 1186. The Ninth Circuit relied specifically on the Court's decision in *Varity Corp.* to affirm the remedy imposed by the district court and explicitly held that "instating" plaintiffs to a benefit plan (to which they were denied by the employer's violation of ERISA) is "appropriate equitable relief" under ERISA. *Id.* at 1186. The court of appeals in this case, however, explicitly declined to follow the Ninth Circuit's decision in *Mathews*. (Appendix, Vol. II to the Petition, at 14a-15a, n. 5 ("[W]e find *Mathews* unpersuasive in this context and decline to follow it.").) Quite simply, the Ninth Circuit directly held that a remedy of "reinstatement to benefits" is appropriate equitable relief under Section 502(a)(3); the Sixth Circuit in this case held directly that it is not. Cf. Sup. Ct. R. 10(a)(certiorari appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

Aside from the clear split regarding the availability of a remedy of reinstatement to benefits under ERISA, the courts of appeals are divided regarding even the general nature of the remedies available under the Act. The Sixth Circuit's decision in this case is similar to decisions of other courts of appeals in *Amschwand v. Spherion Corp.*, __ F.3d __, 2007 WL 3027072 (5th Cir. October 18, 2007); *Eichorn v. AT&T Corp.*, __ F.3d __, 2007 WL 1266133 (3d Cir. May 2, 2007), *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004), and *LaRue v. DeWolff, Broberg & Assoc.*, 458 F.3d 359 (4th Cir. 2006), *cert. granted*, 127 S.Ct. 2971

(2007). Those cases rely upon a decision of the Court, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (holding insurance company's claim for reimbursement against a plan beneficiary for third-party payment to be legal relief unavailable under Section 502(a)3)), to deny any relief under ERISA that requires a defendant to pay money to aggrieved plaintiffs. The Ninth Circuit in *Mathews* and the Third Circuit in *Leckey v. Stefano*, 501 F.3d 212 (3d Cir. 2007)(remanding to district court for reconsideration of the remedy of a constructive trust, even though it may require the payment of money by the defendant), however, while clearly aware of the Court's decision in *Great-West,* have instead relied on the Court's decision in *Varity Corp.* to hold that equitable relief, even if it costs a defendant money, is available to aggrieved ERISA plaintiffs.

Possibly in light of the split among the circuits regarding the remedies available under ERISA, the Court granted certiorari to review the Fourth Circuit's judgment in *LaRue* on June 18, 2007. 127 S. Ct. 2971. One issue presented in that case, which is analogous to the issue presented in this case, is: "Does § 502(a)(3) permit a participant to bring an action for monetary 'make-whole' relief to compensate for losses directly caused by fiduciary breach (know in pre-merger courts of equity as 'surcharge')?" *LaRue v. DeWolff, Broberg & Assoc.*, 2006 WL 3761777 (U.S. Nov. 6, 2006)(petition for writ of certiorari). For the same reasons justifying the issuance of the writ in *LaRue* on the Section 502(a)(3) question presented in that case, the Court should grant the petition in this case.

III. THIS CASE SQUARELY PRESENTS AN IMPORTANT ISSUE PRESENTED IN *LaRUE v. DeWOLFF, BROBERG & ASSOC.* THAT MAY NOT BE REACHED BY THE COURT.

The Court issued the writ in *LaRue* on two issues. One issue in *LaRue* involves the application of Section 502(a)(3), discussed above. See *LaRue v. DeWolff, Broberg & Assoc.*, 2006 WL 3761777 (U.S. Nov. 6, 2006)(petition for writ of certiorari). The other issue in *LaRue* involves the application and interpretation of Section 502(a)(2), codified at 29 U.S.C. § 1132(a)(2) (2001 & Supp. 2007), regarding personal liability for fiduciary breach of duty. *Id.*[4]

In *LaRue*, a participant in a benefit plan sued the plan fiduciary, alleging losses to the participant's account due to the fiduciary's failure to follow the participant's investment choices. The participant sued to "make whole" his losses under Section 502(a)(2) and Section 502(a)(3). Therefore, in deciding *LaRue*, it is possible that the Court may not resolve the question regarding the remedies available under Section 502(a)(3). If the Court rules for Mr. LaRue based solely on a favorable (from Mr. LaRue's perspective) interpretation of Section 502(a)(2), then it is possible

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[4] Section 502(a)(2) of ERISA provides: "a civil action may be brought . . . by a participant . . . for appropriate relief under [29 U.S.C. § 1109] of this title." 29 U.S.C. § 1109 (2007), provides: "a fiduciary with respect to a plan who breaches . . . any duties imposed upon fiduciaries . . . shall be personally liable to make good such plan any losses to the plan resulting from each such breach."

that the Court may decide not to address the Section 502(a)(3) issue presented in *LaRue*.

To the extent that the Court does not decide the Section 502(a)(3) issue presented in *LaRue*, this case provides an excellent alternative case for the Court to decide that issue. Here, the district court found a clear violation of ERISA by Bosch after a full trial. Bosch waived any objection to the district court's finding of liability in the court of appeals. The only basis for a remedy in this case is Section 502(a)(3), and the district court, over the objection of Bosch, determined that Congress authorized a reinstatement-to-benefits remedy in Section 502(a)(3). The court of appeals, however, after full briefing and argument on this issue, rejected the Ninth Circuit's decision in *Mathews* and distinguished the Court's decision in *Varity Corp.* In doing so, the court of appeals squarely held that Congress did not authorize a reinstatement-to-benefits remedy in Section 502(a)(3). Therefore, to the extent that the Court does not resolve the split among the circuits over the nature of remedies available under Section 502(a)(3) in *LaRue*, this case provides a simple, clear and direct opportunity to resolve that split. In particular, this case provides an excellent opportunity for the Court to resolve any ambiguity or conflict between its prior decisions in *Varity Corp.* and *Great-West*, because the remedy in this case is the precise remedy approved by the Court in *Varity Corp.*

Finally, if the Court reaches the Section 502(a)(3) issue presented in *LaRue*, the Court should, at a minimum, grant the petition in this case, vacate the decision below, and remand this case to the court of appeals for further consideration in light of the Court's

decision in *LaRue*. The plaintiffs in this case should not be prejudiced by the fact that the court of appeals decided their case prior to the Court's clarification of the proper interpretation of Section 502(a)(3) in *LaRue*.

CONCLUSION

The petition should be granted. The writ of certiorari should issue, and the Court should resolve the split among the courts of appeals by deciding this case on the merits. In the alternative, and to the extent that the Court clarifies the proper interpretation of Section 502(a)(3) in *LaRue*, the Court should issue the writ, vacate the judgment below, and remand this case to the court of appeals for reconsideration in light of *LaRue*. In either event, the petition should be granted.

Respectfully submitted.

C. Mark Pickrell
Counsel of Record
Tanielle Henriques
Alyssa Leffall
Waller Lansden Dortch
& Davis, LLP
511 Union Street
Suite 2700
Nashville, TN 37219
(615) 850-8913

Kevin Sharp
Drescher & Sharp, P.C.
1720 West End Avenue
Suite 300
Nashville, TN 37203

Joseph Y. Longmire
103 Bluegrass Commons Blvd.
Hendersonville, TN 37074

Larry D. Wilks
509 West Court Square
Springfield, TN 37172

APPENDIX A

232 Fed. Appx. 491.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 05-6010

[Filed May 14, 2007]

NANCY ALEXANDER, et al.,	)
Plaintiffs-Appellees,	)
v.	)
BOSCH AUTOMOTIVE SYSTEMS, INC.,	)
Defendant-Appellant,	)
UNITED AUTO WORKERS, LOCAL 2296	)
Defendant.	)

On Appeal from the United States District Court for the Middle District of Tennessee.

C. Mark Pickrell, Waller, Lansden, Dortch & Davis, Nashville, TN, Kevin H. Sharp, Drescher & Sharp, Nashville, TN, Joseph Y. Longmire, Jr., Hendersonville, TN, T. Steven Perry, Stokes, Bartholomew, Evans & Petree, Nashville, TN, Larry D. Wilks, Law Offices of Larry D. Wilks, Springfield, TN, for Plaintiffs-Appellees.

Gary R. Kessler, Ann B. Hale-Smith, Irvin & Kessler, Atlanta, GA, Randall A. Constantine, Mazursky Constantine, Atlanta, GA, Robert J. Mendes, MGLAW, PLLC, Nashville, TN, for Defendant-Appellant.

BEFORE: BATCHELDER and MOORE, Circuit Judges; COHN*, District Judge.

ALICE M. BATCHELDER, Circuit Judge. Defendant Bosch Automotive Systems, Inc. ("Bosch"), appeals the district court's ruling in favor of Plaintiffs Nancy Alexander and thirty-five other former employees (collectively referred to as "Plaintiffs") on Plaintiffs' claim of unlawful interference with plant closure benefits pursuant to Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. After finding Bosch liable on that claim, the district court ordered Bosch to "instate" Plaintiffs to the list of employees eligible to receive plant closure benefits under Bosch's collective bargaining agreement. Bosch concedes liability on appeal, arguing that we should reverse the district court's judgment because the remedy is not "appropriate equitable relief" as permitted under

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* The Honorable Avern Cohn

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Because we agree that the district court did not grant "appropriate equitable relief," and because we are unable to identify any other equitable relief that would be appropriate in this case, we **VACATE** the judgment of the district court and **REMAND** with instructions to enter judgment consistent with this opinion.

I.

During the 1990s, Bosch operated an electronic motors manufacturing facility in Hendersonville, Tennessee. Because the plant was unprofitable during most of its history, Bosch continually questioned whether it should discontinue operations and close the plant. At all relevant times, the Hendersonville plant was unionized, and United Auto Workers Local 2296 ("Union") represented the employees. In July 1997-amidst various rumors and discussions of an inevitable plant closure-Bosch and the Union renegotiated their *493 collective bargaining agreement ("1997 Agreement"), which was to govern for a three-year period until July 2000. Under the terms of the 1997 Agreement, Bosch agreed to give plant closure benefits[1] to laid-off employees who retained "protected service status"-a status that lasted for twelve months following the employee's initial layoff. The 1997 Agreement also required Bosch to provide the Union and the employees with notice six months prior to the plant's closing.

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[1] The plant closure benefits included lump sum severance pay, a special early retirement option, and a plant closing pension option.

In the middle of 1998, Bosch eliminated one shift and laid off a large number of workers. In late 1998 and early 1999, Bosch management discussed future layoffs and the eventual plant closure, acknowledging that they could avoid paying plant closure benefits if they waited more than twelve months after layoffs (i.e., until the employees' protected service status expired) to close the plant. After numerous meetings and virtually endless discussions, Bosch eliminated another shift and laid off sixty-three additional workers on October 29, 1999; Plaintiffs were included in this group of laid-off employees and were given the lay-off benefits mandated by the 1997 Agreement. On May 11, 2000, Bosch announced it would be closing the Hendersonville plant in November 2000-just over twelve months after the October 29, 1999, layoff; Bosch also announced that any employee who had been laid off more than six months prior to May 11, 2000, which included Plaintiffs, would not receive plant closure benefits under the terms of the 1997 Agreement.

Because the 1997 Agreement was set to expire on July 16, 2000, Bosch and the Union negotiated an agreement to govern the period between July 2000 and November 2000. The Union was eager to extend the 1997 Agreement because the remaining sixty-nine workers at the plant risked losing their benefits if the agreement lapsed. On July 6, 2000, Bosch and the Union executed a Closure Agreement and a Layoff Agreement[2] (collectively referred to as the "2000

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[2] The Layoff Agreement, which was executed for the express purpose of resolving the effects of the October 29, 1999, layoff, purported to settle all claims arising out of that layoff in exchange

Agreement"). The 2000 Agreement extended the terms of the 1997 Agreement until the plant's closing in November 2000 and expressly provided that the 2000 Agreement would control in the event of a conflict with the 1997 Agreement. The active bargaining unit, which did not include Plaintiffs, ratified the 2000 Agreement on July 14, 2000. The 2000 Agreement contained Schedule 1, which listed all employees eligible for plant closure benefits and did not include Plaintiffs. As promised, Bosch closed the plant on November 17, 2000.

On January 17, 2001-exactly two months after the plant's closing-Plaintiffs filed suit against Bosch and the Union. In Count One, Plaintiffs brought a claim against Bosch to recover plant closure benefits pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). In Count Two, Plaintiffs brought another claim against Bosch for unlawful interference with benefits pursuant to Section 510 of ERISA, 29 U.S.C. § 1140. In Count Three, Plaintiffs asserted a claim against the Union, alleging that the Union breached its duty of fair representation by entering into the 2000 Agreement with Bosch. The district court dismissed Plaintiffs' ERISA § 502(a)(1)(B) claim on summary judgment, and the parties voluntarily settled the duty of fair representation claim *494 against the Union; thus the ERISA § 510 claim against Bosch was

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for a lump-sum severance payment. Bosch does not seek to enforce the release in the Layoff Agreement. It appears that Plaintiffs did not sign the release or request the payments from Bosch; accordingly, Bosch did not make payments to Plaintiffs, and Plaintiffs' claims have not been released.

the only claim that proceeded to trial. After trial, the district court issued an oral ruling from the bench, concluding that Bosch violated ERISA § 510 by purposefully timing Plaintiffs' layoff and the plant's closing to avoid paying plant closure benefits to Plaintiffs. The court held that the October 29, 1999 layoff was itself a violation of ERISA § 510. As a remedy, the district court ordered Bosch to add Plaintiffs' names to Schedule 1 of the 2000 Agreement, thus entitling them to plant closure benefits.

II.

When reviewing a judgment issued after a bench trial, "we review the district court's findings of fact for clear error and its conclusions of law *de novo*." *Lindstrom v. A-C Prod. Liab. Trust,* 424 F.3d 488, 492 (6th Cir.2005) (citing *Pressman v. Franklin Nat'l Bank,* 384 F.3d 182, 185 (6th Cir.2004)).

Bosch devoted most of its brief to arguing that its actions did not violate ERISA § 510, but in somewhat surprising fashion-and for no reason that is apparent to this Court-Bosch conceded ERISA § 510 liability at oral argument. Because Bosch conceded this issue, we need not address it and express no opinion as to whether Bosch discharged Plaintiffs for the purpose of interfering with their plant closure benefits in violation of ERISA § 510. Bosch presents two other arguments it did not abandon at oral argument, and we will address these in turn. First, Bosch contends that Plaintiffs' ERISA § 510 claim was filed outside the applicable statute of limitations period and should have been dismissed. Second, Bosch asserts that the district court's judgment should be overturned because

the remedy was not "appropriate equitable relief" as permitted by ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

A.

Because ERISA § 510 does not provide its own statute of limitations, we apply the limitations period for the most analogous state law claim. *See DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 158, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) (stating that where "there is no federal statute of limitations expressly applicable to [a] suit," the courts "have generally concluded that Congress intended . . . the courts [to] apply the most closely analogous statute of limitations under state law"). The circuit courts have widely recognized that ERISA § 510 claims are most analogous to "state employment discrimination or wrongful termination claims." *Ellis v. Ford Motor Co.,* No. 95-1801, 1996 WL 435199, at * 1 (6th Cir. August 1, 1996) (citing *Taylor v. Goodyear Tire & Rubber Co.,* No. 93-4059, 1994 WL 573913, at *1 (6th Cir. October 17, 1994)). *Accord McClure v. Zoecon, Inc.,* 936 F.2d 777, 778 (5th Cir.1991) (construing ERISA § 510 claims "as wrongful discharge or employment discrimination claims"); *Burrey v. Pacific Gas and Elec. Co.,* 159 F.3d 388, 397 (9th Cir.1998) (applying the state statute of limitation for claims of "wrongful discharge in violation of public policy"); *Held v. Mfrs. Hanover Leasing Corp.,* 912 F.2d 1197, 1205 (10th Cir.1990) (noting that the "most analogous [state law] claim . . . is a claim for employment discrimination"). Under Tennessee law, the statute of limitations for employment discrimination claims under the Tennessee Human Rights Act is one year. Tenn.Code Ann. § 4-21-311(d).

The parties agree that this one-year period is the applicable statute of limitations for Plaintiffs' ERISA § 510 claim.

The parties, however, disagree on when Plaintiffs' ERISA § 510 claim accrued. *495 The district court found that Plaintiffs' claim accrued on May 11, 2000, when Bosch announced it would close the plant in November 2000 and informed Plaintiffs that they would not receive plant closure benefits under the 1997 Agreement. Plaintiffs agree with the district court that their ERISA § 510 claim accrued on May 11, 2000, and thus they assert that their claim was timely filed in January 2001; Bosch, on the other hand, contends that the proper accrual date is October 29, 1999-when Plaintiffs were laid off; therefore, Bosch believes Plaintiffs filed their claim after the statute of limitations had run.

Our circuit has yet to consider the accrual of ERISA § 510 claims, but the Seventh Circuit meticulously and persuasively addressed this issue in *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir.1992). In *Tolle*, the Seventh Circuit noted that "under the federal discovery rule, a claim accrues once the party performs the alleged unlawful act and once the party bringing a claim discovers an injury resulting from this unlawful act." *Id.* at 1139. "Because the relevant portions of [ERISA §] 510 aim to prevent employers and other persons from taking action for purposes of preventing a participant from or punishing a participant for exercising his or her rights under a plan, the accrual of [a] Section 510 claim[ ] turns on such [unlawful] actions." *Id.* at 1140 (relying on *Heideman v. PFL Inc.*, 904 F.2d 1262, 1267 (8th Cir.1990); *Held*, 912 F.2d at

1205). Accrual does not occur as soon as a defendant acts for an unlawful purpose; rather, accrual is delayed until the plaintiff discovers an injury resulting from the defendant's unlawful actions. *Id.* at 1140-41. Finding *Tolle's* reasoning persuasive, we employ it in determining when Plaintiffs' ERISA § 510 claim accrued.

The alleged unlawful act in this case was not Bosch's decision to lay off Plaintiffs; rather, it was Bosch's intentional timing of the layoff and plant closing to deprive Plaintiffs of plant closure benefits. This scheme involved both the layoff and the closure, and it was not fully implemented until Bosch's May 11, 2000, announcement of the plant closing. Moreover, Plaintiffs did not learn that they would be deprived of benefits until the May 11, 2000, announcement. Because Plaintiffs would have been entitled to plant closure benefits if the plant closed before October 29, 2000 (i.e., while they maintained "protected service status" which lasted for one year following their October 29, 1999 layoff), they did not learn that they would not receive those benefits until Bosch announced that it would close the plant in November 2000. Consequently, Plaintiffs' ERISA § 510 claim accrued on May 11, 2000, when Defendants' completed their alleged unlawful scheme and Plaintiffs' learned that they would not be entitled to plant closure benefits under the 1997 Agreement.

Bosch argues that Plaintiffs' claim must have accrued on October 29, 1999-when Plaintiffs were laid off-because Bosch's decision to lay off Plaintiffs was the only action that affected the employment relationship. Bosch's argument relies on Sixth Circuit

case law stating that a defendant's conduct must "affect the individual's employment relationship in some substantial way" in order to come within the conduct proscribed by ERISA § 510. *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1391 (6th Cir.1994) (quoting *West v. Butler*, 621 F.2d 240, 245-46 (6th Cir.1980)). We are not persuaded by Bosch's argument because we have since clarified the cited propositions in *West*, noting that it is improper to interpret ERISA § 510 as "cover[ing] only conduct related to employment relationships." *496 *Mattei v. Mattei*, 126 F.3d 794, 800 (6th Cir.1997). We also stated that courts should not "view[ ] attacks on the 'employment relationship' as a *sine qua non* of § 510 coverage"; instead, courts should view *West's* reference to the "'employment relationship' as an illustrative but non-exclusive description of a set of rights that are protected by § 510[.]" *Id.* We therefore reject any notion that the defendant's actions must affect the plaintiff's employment relationship in order to constitute a violation of ERISA § 510, and we consequently reject Bosch's unwarranted focus on the employment relationship-rather than its alleged unlawful scheme-in calculating an accrual date for Plaintiffs' ERISA § 510 claim.[3]

For the foregoing reasons, we hold that Plaintiffs' claim accrued on May 11, 2000-when they learned that

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[3] The parties also dispute whether the statute of limitations period should be subject to equitable tolling. Because we determine that Plaintiffs' filed their ERISA § 510 claim within the relevant statute of limitations period, we need not address the issue of equitable tolling.

the plant would close in November 2000 and they would not receive their plant closure benefits-not October 29, 1999-when they were first laid off and were unaware whether they would receive the benefits. We affirm the district court's finding that Plaintiffs timely filed their ERISA § 510 claim.

B.

ERISA § 510's prohibition against interfering with employee benefits is enforced through the provisions of ERISA § 502. 29 U.S.C. § 1140. ERISA § 502(a)(3) authorizes a civil action:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other *appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan.

29 U.S.C. § 1132(a)(3) (emphasis added). Thus ERISA 502(a)(3) authorizes a court to award a plaintiff "appropriate equitable relief" when a defendant violates ERISA § 510. The Supreme Court has noted that "equitable relief" as used in this context "must mean *something* less than *all* relief." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 n. 8, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). More specifically, "the term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were *typically* available in equity [.]'" *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) (quoting *Mertens*, 508 U.S. at 256, 113 S.Ct. 2063). Traditional equitable remedies

include certain kinds of injunctions and restitution, but not compensatory damages-which are "the classic form of *legal* relief," *see Mertens,* 508 U.S. at 255, 113 S.Ct. 2063-or "specific performance of a past due monetary obligation." *Knudson,* 534 U.S. at 211, 122 S.Ct. 708. When determining whether a remedy was typically available in equity, the Court has instructed us to "consult [ ] . . . standard current works such as Dobbs, Palmer, Corbin, and the Restatements." *Id.* at 217, 122 S.Ct. 708; *see Millsap v. McDonnell Douglas Corp.,* 368 F.3d 1246, 1252 (10th Cir.2004).

As relief in this case, the district court ordered Bosch to amend the 2000 Agreement by including Plaintiffs in Schedule 1-the list of employees entitled to plant closure benefits. The district court characterized this remedy as a form of reinstatement. We disagree with the district court's characterization of its remedy and find that no matter how we label this relief-no matter which equitable *497 term we wish to attach-the district court's remedy is not "appropriate equitable relief" pursuant to ERISA § 502(a)(3).

We begin with the district court's belief that its relief amounts to equitable reinstatement. Reinstatement is a remedy that arises in the context of unlawful terminations from employment. *See Slayton v. Ohio Dep't of Youth Servs.,* 206 F.3d 669, 680 (6th Cir.2000); 1 D. Dobbs, Law of Remedies § 2.9(1), p. 223 (2d ed. 1993) ("Reinstatement in a job is a remedy for job discrimination in some cases[.]"). The remedy of reinstatement requires an employer to rehire an unlawfully terminated employee to her former position or an equivalent one. *See* 2 Dobbs, *supra,* § 6.10(4), at 207-08. We have repeatedly

recognized that there are some instances where reinstatement is not necessarily "appropriate," *see EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 836 (6th Cir.1997); *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 998 (6th Cir.1991), and other cases where "reinstatement is not [even] possible." *Fuhr v. Sch. Dist. of Hazel Park*, 364 F.3d 753, 761 (6th Cir.2004) (quoting *Shore v. Fed. Express Corp.*, 777 F.2d 1155, 1159 (6th Cir.1985)). We find that this is one of those cases where reinstatement is not possible because Bosch closed the Hendersonville plant prior to the commencement of these proceedings and there are no available jobs to which Plaintiffs can be reinstated. *See Davis v. Passman*, 442 U.S. 228, 245, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (involving a congressional assistant's suit against a former Congressman for unlawful discrimination and reasoning that because the defendant "is no longer a Congressman, equitable relief in the form of reinstatement would be unavailing") (internal citations omitted); *Millsap*, 368 F.3d at 1249 (recapping the district court's conclusion that "the circumstances of th[e] case made reinstatement impossible" because the plant where the plaintiffs worked had been closed); *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir.2005) (noting that the plaintiffs were "unable to seek the remedy of reinstatement under [ERISA § 502(a)(3)] due to [the defendant's] bankruptcy" and subsequent closure); *Guercio v. Brody*, 911 F.2d 1179, 1190 (6th Cir.1990) (involving a secretary's suit of a bankruptcy judge for wrongful termination and noting that "the authority of the district court to order [the secretary] reinstated . . . is subject to question" because the bankruptcy judge retired from the court and the "secretarial position no longer exist[ed]").

Instead of reinstating Plaintiffs to their former positions, which is impossible to do in this situation, the district court "instated"[4] Plaintiffs' names to the 2000 Agreement and characterized this as a type of reinstatement remedy. We disagree with this characterization and conclude that the type of relief ordered by the district court-requiring Bosch to amend the 2000 Agreement by adding Plaintiffs' names to Schedule 1-is more like the remedy of contractual reformation, rather than reinstatement.[5] We now

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[4] We use the term "instated," rather than "reinstated," because Plaintiffs' names were not originally included on Schedule 1 of the 2000 Agreement; therefore, it does not make sense to "reinstate" Plaintiffs to an agreement in which they were not originally included.

[5] The district court replied on two cases to conclude that reinstating Plaintiffs' to the 2000 Agreement constituted "appropriate equitable relief" under ERISA § 502(a)(3). *See Varity Crop. V. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed.2d 130 (1996); *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir.2004). In *Varity*, the Supreme Court considered three substantive ERISA issues: (1) whether the employer was acting in its capacity as an ERISA "fiduciary"; (2) whether the employer violated its fiduciary obligations to the plaintiffs; and (3) whether ERISA permitted individual plan beneficiaries to bring suit for harm caused by the employer's breach of fiduciary obligations. *Varity*, 516 U.S. at 492, 116 S. Ct. 1065. Prior to the Supreme Court's review of these substantive issues, the Eighth Circuit affirmed "an injunction reinstating [the retired plaintiffs] as members of the [welfare benefits plan] under the terms of that plan as it existed at the time of retirement." *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir.1994). The Supreme Court did not consider the propriety of the Eighth Circuit's remedy-ordering reinstatement of the plaintiffs into the welfare benefits plan-because the defendant

consider whether we *498 can affirm the district court's remedy as a type of equitable reformation.

Reformation is a contractual remedy that was typically available in equity. *See William Cramp & Sons Ship & Engine Bldg. Co. v. United States,* 239 U.S. 221, 228, 51 Ct.Cl. 478, 36 S.Ct. 70, 60 L.Ed. 238 (1915); *Hearne v. Marine Ins. Co.,* 87 U.S.(20 Wall.) 488, 490, 22 L.Ed. 395 (1874) (recognizing that "reformation of written contracts . . . is an ordinary head of equity jurisdiction"); 2 Dobbs, *supra,* § 11.6(3), at 751 ("Reformation is historically an equitable remedy, not a legal one."). Generally stated, reformation is available where the parties to a contract reached a valid agreement, but that mutually agreed-

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conceded that issue on appeal before the Supreme Court. *See Callery v. U.S. Life Ins. Co. in NewYork,* 392 F.3d 401, 406 (10th Cir.2004) (discussing the *Varity* decision and stating that "the issue of whether the relief sought, namely reinstatement, was equitable was conceded and not before the Court"). Therefore, we do not find *Varity* to be persuasive authority on this remedy issue. In *Mathews*, the district court, after finding an ERISA violation, ordered the defendant "to take all steps within its authority to modify the plan records . . . to ensure that [the] six plaintiffs [were] provided [ERISA] benefits[s][.]" *Mathews,* 362 F.3d at 1186. The Ninth Circuit affirmed the district court's relief, finding that this "instatement" remedy was "appropriate equitable relief." *Id.* at 1187. Because we find that this type of "instatement" remedy-requiring an employer to amend the terms of the benefit plan-is more akin to contractual reformation, rather than reinstatement, and because the *Mathews'* decision relied in part on *Varity*, *see id.* at 1186 (noting that "the relief granted by the district court . . . [was] similar to that upheld by the Supreme Court in *Varity*"), we find *Mathews* unpersuasive in this context and decline to follow it.

upon understanding was inadequately, mistakenly, or fraudulently conveyed in writing. *See Perkins-Campbell Co. v. United States,* 264 U.S. 213, 218-19, 44 S.Ct. 237, 68 L.Ed. 643 (1924) (recognizing that the "well-established principles of equity jurisprudence requires Reformation is a contractual remedy that was typically available in equity. *See William Cramp & Sons Ship & Engine Bldg. Co. v. United* States, 239 U.S. 221, 228, 51 Ct.Cl. 478, 36 S.Ct. 70, 60 L.Ed. 238 (1915); *Hearne v. Marine Ins. Co.,* 87 U.S.(20 Wall.) 488, 490, 22 L.Ed. 395 (1874) (recognizing that "reformation of written contracts ... is an ordinary head of equity jurisdiction"); 2 Dobbs, supra, § 11.6(3), at 751 ("Reformation is historically an equitable remedy, not a legal one."). Generally stated, reformation is available where the parties to a contract reached a valid agreement but that mutually agreed upon understanding was inadequately, mistakenly, or fraudulently conveyed in writing. *See Perkins-Campbell Co. v. United States,* 264 U.S. 213, 218-19, 44 S.Ct. 237, 68 L.Ed. 643 (1924) (recognizing that the "well-established principles of equity jurisprudence requires the the reformation of [a] contract" if there is a "mutual mistake of the parties"); *H. Prang Trucking Co., Inc. v. Local Union No. 469,* 613 F.2d 1235, 1239 (3d Cir.1980) ("Reformation presupposes that a valid contract between the parties was created but, for some reason, was not properly reflected in the instrument that memorializes the agreement."); 2 Dobbs, *supra,* § 11.6(1), at 743 ("Where parties agree on a contract, but write it down in a way that materially departs from their true agreement, the writing may be reformed by a court having equity powers[.]"). In our case, there are no allegations that the 2000 Agreement was validly agreed upon but improperly reduced to

writing. Instead, the 2000 Agreement properly reflected the underlying agreement of Bosch and the Union, and thus it is not a candidate for the traditional equitable remedy of reformation. Requiring Bosch to amend the 2000 Agreement contradicts a fundamental premise of traditional reformation by intruding upon the contracting parties' (i.e., Bosch's and the Union's) original agreement. 2 Dobbs, *supra,* § 11.6(2), at 748 ("[C]ourts have said repeatedly that reformation may not be used to foist upon the parties a contract they never made."); 2 Dobbs, *supra,* § 11.6(1), at 743 (noting that the "purpose of reformation is not to make *499 a new contract for the parties, but rather to adequately express the contract they have made for themselves"). There is an additional reason why reformation is awkward in our case. Reformation is typically-and perhaps always-sought by a party to the challenged agreement. Here, however, neither party to the agreement (i.e., Bosch or the Union) is requesting reformation; rather, reformation is requested by a third party (i.e., Plaintiffs).

Nor do we conclude that it would be appropriate to order Bosch to reform its collective bargaining agreement. While courts have recognized that the remedy of reformation may be used to amend a collective bargaining agreement where mistake or fraud caused the writing incorrectly to reflect the parties' agreement, *see NLRB v. Cook County Sch. Bus, Inc.,* 283 F.3d 888, 895 (7th Cir.2002); *H. Prang Trucking,* 613 F.2d at 1239, the agreement in this case was mutually agreed-upon, accurately expressed, and properly ratified. *See United Mine Workers of Am. Health and Ret. Funds v. Robinson,* 455 U.S. 562, 576, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982) ("[W]hen neither

the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract.").[6] Bosch and the Union included plant closure benefits in their July 2000 negotiations, and their resolution of this issue deprived Plaintiffs of plant closure benefits by excluding them from Schedule 1 of the Agreement. While the Union may have breached its duty of fair representation during these negotiations-a claim which the parties settled during the pendency of this litigation-we are disinclined to order Bosch now unilaterally to amend the 2000 Agreement, thereby displacing Bosch's and the Union's resolution of this benefits issue. *See Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 219, 100 S.Ct. 410, 62 L.Ed.2d 394 (1979) ("If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution."). *Cf. Jackson v. Smith*, 927 F.2d 544, 549 (11th Cir.1991) ("Where . . . the parties have established during the course of collective bargaining the level of benefits as well as the

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[6] The alleged ERISA § 510 violation consisted of Bosch's intentional timing of Plaintiffs' layoff and the plant's closing to deprive Plaintiffs of plant closure benefits. This scheme began when Bosch laid these plaintiffs off on October 29,1999, and culminated with the May 2000 announcement of the plant-closure, well before the July 2000 labor negotiations. Because this alleged unlawful conduct did not include the July 2000 contract negotiations, we find that neither the July 2000 collective-bargaining process "nor its end product violate[d] any command of Congress," *see Robinson*, 455 U.S. at 576, 102 S.Ct. 1226, especially considering that Plaintiffs have settled their duty of fair representation claim against the Union.

procedure for changing those benefits, federal courts are barred from modifying those terms."); *White v. Distribs. Assoc. Warehousemen's Pension Trust,* 751 F.2d 1068, 1071 (9th Cir.1985) (reasoning that because "the rules affecting the plaintiff's pension benefits were fixed by collective bargaining agreement," they are "insulated from judicial review under ERISA"). It is also problematic to reform the 2000 Agreement because any alleged ERISA violation occurred under the 1997 Agreement, which had expired and was no longer governing by the time Plaintiffs instituted this suit.

Having determined that the traditional equitable remedy of reformation does not characterize the relief granted by the district court, we now consider whether we could fashion any other sort of appropriate equitable relief for Plaintiffs, specifically *500 considering whether we could award equitable restitution under these circumstances. The purpose of restitution is "to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction." 1 Dobbs, *supra,* § 4.1(1), at 552. Restitution "may be a return of a specific thing or it may be a 'return' of a money substitute for that thing." 1 Dobbs, *supra,* § 4.1(1), at 551. The Supreme Court-in construing whether restitution qualifies as "appropriate equitable relief" under ERISA § 502(a)(3)-has recognized that "not all relief falling under the rubric of restitution is available in equity." *Knudson,* 534 U.S. at 212, 122 S.Ct. 708 ("In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity."); *accord Sereboff v. Mid Atlantic Med. Servs. Inc.,* --- U.S. ----, 126 S.Ct. 1869, 1874, 164 L.Ed.2d 612 (2006).

"Whether [restitution] is legal or equitable depends on the basis for [the plaintiff's] claim and the nature of the underlying remedies sought." *Knudson*, 534 U.S. at 213, 122 S.Ct. 708 (internal quotations omitted). Restitution *at law* is available "[i]n cases in which the plaintiff could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him[.]" *Id.* (emphasis omitted) (internal quotations omitted); *see* 1 Dobbs, *supra*, § 4.2(1), at 571 (recognizing that legal restitution is available whenever the plaintiff "convince[s] the court that he ought to *recover something* from the defendant as a matter of justice or good conscience") (emphasis added). "In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Knudson*, 534 U.S. at 213, 122 S.Ct. 708; *accord Sereboff*, 126 S.Ct. at 1874. "But where the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor, and the plaintiff cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." *Knudson*, 534 at 213-14, 122 S.Ct. 708 (alteration in original) (internal quotations omitted). "Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214, 122 S.Ct. 708.

In light of the foregoing authority, our task of determining whether we can award Plaintiffs with equitable restitution turns on whether Plaintiffs seek to recover particular property or particular and identifiable funds in Bosch's possession. We are not faced with the typical case for equitable restitution-an instance where the plaintiff transfers identifiable funds or property to the defendant and the law orders the breaching defendant to return that specific property; indeed, the doctrine of equitable restitution is an awkward fit under these circumstances because Plaintiffs did not transfer identifiable funds or property to Bosch. *See Geissal ex rel. Estate of Geissal v. Moore Med. Corp.*, 338 F.3d 926, 932 (8th Cir.2003) (stating that the plaintiff did not have a claim for restitution because she was not seeking to recover a benefit that she conferred upon the defendant, but a benefit indirectly conferred upon the defendant by third parties); *Calhoon*, 400 F.3d at 597 (noting that a plaintiff has a claim for equitable restitution where she "overpays and sues under ERISA to recover the specific *501 amount that was overpaid into a particular account").

Plaintiffs seeking equitable restitution have the burden of establishing that the funds they seek are traceable and readily identifiable. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 332 (4th Cir.2006). But here, Plaintiffs have not identified particular and traceable funds as required by *Sereboff* and *Knudson*. *See Sereboff*, 126 S.Ct. at 1874; *Knudson*, 534 U.S. at 214, 122 S.Ct. 708. Any restitutionary-type relief in this case would order Bosch to pay funds to reimburse Plaintiffs for the value of the plant closure benefits. Such a remedy does not seek "specifically identifiable

funds," but rather seeks to impose "personal liability" on Bosch by recovering "some funds" from Bosch's "assets generally." *See Sereboff,* 126 S.Ct. at 1874; *Knudson,* 534 U.S. at 214, 122 S.Ct. 708. We find, therefore, that any restitutionary remedy in this case would constitute legal relief not available under ERISA § 502(a)(3). *See Callery v. U.S. Life Ins. Co. in New York,* 392 F.3d 401, 406 (10th Cir.2004) (refusing to characterize the plaintiff's requested relief as equitable restitution because she was "not seeking to regain particular funds or property"); *N. Am. Coal Corp. v. Roth,* 395 F.3d 916, 917 (8th Cir.2005) (reversing the district court's "award of restitution of a sum certain" and its "finding of personal liability" because these remedies were not authorized under ERISA § 502(a)(3)).

Moreover, the Supreme Court has indicated that "[a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages' . . . since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *See Knudson,* 534 U.S. at 210, 122 S.Ct. 708. We find that any restitutionary-type relief in this case would merely compel the payment of money from a general fund and constitute money damages. It would be a severe contortion of remedies law to characterize as equitable restitution Bosch's payment from an unidentifiable fund source to reimburse Plaintiffs the value of their plant closure benefits. We therefore conclude that Plaintiffs cannot be awarded equitable restitution under the circumstances of this case.

In sum, Plaintiffs are left without a remedy that falls under the rubric of "appropriate equitable relief" as permitted under ERISA § 502(a)(3). Such an unsettling phenomenon is not unheard of in ERISA cases. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 222, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004) (Ginsburg, concurring) (noting "a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief"). Our somewhat discomfiting resolution of this case is similar to that which occurred in *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir.2004), in which the plaintiffs alleged that McDonnell Douglas violated ERISA § 510 by closing its Tulsa plant "to prevent [the] [p]laintiffs from attaining eligibility for benefits under their pension and health care plans." *Id.* at 1248. The district court bifurcated the case into liability and remedial phases, and the plaintiffs succeeded in establishing that McDonnell Douglas had unlawfully interfered with their ERISA benefits in violation of ERISA § 510. During the remedial phase, McDonnell Douglas filed a motion to preclude an award of reinstatement, front pay, and backpay under ERISA § 502(a)(3). The district court granted McDonnell Douglas's motion to preclude reinstatement and front pay, reasoning that "the circumstances of th [e] case made reinstatement impossible and front pay inappropriate because the court could not *502 conclude that but for [McDonnell Douglas's] discriminatory conduct the Tulsa plant would still be open." *Id.* at 1249. The backpay issue progressed to the Tenth Circuit, where the court held that backpay was unavailable to the plaintiffs because it was not traditional equitable relief. *Id.* at 1254. The court concluded by stating that it was "not unsympathetic"

to the fact that the plaintiffs were left without a remedy; but the court acknowledged that it was "reluctant to tamper" with ERISA's remedial scheme and noted that "there may have been other means . . . for [the][p]laintiffs to obtain . . . relief." *Id.* at 1260.

We likewise are not calloused to Plaintiffs' distressing situation-a conceded statutory violation without a remedy-but we recognize that Plaintiffs might have had other remedies available to them had they brought their claims prior to the plant's closing or the expiration of the 1997 Agreement. Plaintiffs learned that they would not receive plant closure benefits in May 2000, yet they waited until January 2001 to file suit. While we acknowledge that this is not an excessive delay-and indeed Plaintiffs filed suit quickly enough to satisfy the short statute of limitation-we nevertheless recognize that, had Plaintiffs filed this action before the plant closed, they would at least have had a stronger argument that they were entitled to be recalled to their former positions and thus made eligible for the plant closing benefits.

We conclude by noting that Congress has provided the limited remedies found in ERISA § 502(a)(3), and it "did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 146, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *see Dollar Sav. Bank v. United States,* 86 U.S.(19 Wall.) 227, 233, 22 L.Ed. 80 (1873) ("[W]here a statute creates a right, and provides a particular remedy by which that right may be vindicated, no other remedy than that afforded by the statute can be used."). Our role is to award the remedies Congress has prescribed, *see Callery,* 392

F.3d at 407 (stating that "the limitation of remedy [in ERISA § 502(a)(3)] is the product of the statute and [the courts] must enforce it"); our role does not extend to the expanding of ERISA remedies, *see Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1061 (8th Cir.2006); *Calhoon*, 400 F.3d at 598. If there is to be any exception to or expansion of these remedies, it must come from Congress, not from this bench. *See Millsap*, 368 F.3d at 1260 (quoting *Guidry v. Sheet Metal Workers Nat'l Pension*, 493 U.S. 365, 376, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990)).

III.

For the foregoing reasons, we hold that the district court did not award "appropriate equitable relief" pursuant to ERISA § 502(a)(3). Because Plaintiffs have not established, and we have not found, any other equitable relief that would be appropriate here, we hold that Plaintiffs are without a remedy. Accordingly, we **VACATE** the district court's judgment and **REMAND** with instructions to enter judgment consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

No. 3:01-0060

[Filed May 26, 2005]

NANCY ALEXANDER, *et al.*,

Plaintiffs,

v.

BOSCH AUTOMOTIVE SYSTEMS, INC.and UNITED AUTO WORKERS, LOCAL 2296,

Defendants.

MEMORANDUM AND ORDER

At the conclusion of the 3-day bench trial held in this case, the Court announced its findings of fact and conclusions of law from the bench on the record, which are incorporated herein by reference as if set forth verbatim. Also incorporated herein are the following four memorandum decisions issued by this Court

during the course of this case: Docket No. 36 issued June 22, 2001, Docket No. 68 issued June 21, 2002, Docket No. 82 issued March 28, 2003 and Docket No. 173 issued March 7, 2005.

For the reasons expressed on the record and in these four memorandum decisions, the Court finds that the plaintiffs have established a violation of Section 510 of ERISA, 29 United States Code §1140, for which judgment may enter. As the remedy, the Court hereby **ORDERS** that the defendant Bosch shall add each plaintiff to the appropriate Schedule attached to the Closure Agreement (Trial Exhibit 13), which placement will entitle them to the benefits to which they would have been entitled, had they not been laid off by Bosch on October 29, 1999. It is further **ORDERED** that the defendant Bosch shall file with the Court by June 24, 2005, a listing of the plaintiffs with the schedule designation made.

It is so **ORDERED**.

Enter this 26th day of May, 2005.

ALETA A. TRAUGER
U.S. District Judge

APPENDIX C

[Excerpt from the Trial Transcript – Findings of Fact and Conclusions of Law]

THE COURT: The Court is going to go ahead and rule on this matter. The following will be my findings of fact and conclusions of law which will be incorporated in the order.

In part, I'm doing this because I have already written four opinions in this case, and you all have presented a very cogent case to me for the remaining issues to be decided in the trial; and, therefore, I feel you've prepared me to make this decision.

And I will go ahead and incorporate in my ruling, as well, all these prior decisions because some of – the defendant particularly has reraised some of these issues in this trial that I've already ruled on.

So I'm going to incorporate my memorandum decision issued June 22 of '01, which is docket number 36; my memorandum decision issued June 21 of '02, docket number 68; my memorandum decision issued March 28 of '03, docket number 82; and my memorandum decision entered March 7, '05, which is docket number 173.

This is a case where the remaining claim is a claim under Section 510 of the ERISA law, which provides in part, "It shall be unlawful for any person to discharge"

– I'm going to do in relevant part – "to discharge or discriminate against a participant or beneficiary for the purpose of interfering with the attainment of any right to which such a participant may become entitled under the plan."

The plaintiffs have presented and carried their burden of proof in this case either as a direct evidence case or as a circumstantial evidence case, and I'm going to go through the proof as I see it in a minute.

But the direct evidence case, it's pretty clear, the plaintiff simply has to show that there is direct evidence that the employer terminated them, in this case laid them off, with a specific intent to interfere with their rights under ERISA.

In the circumstantial evidence case, it's basically likened to a Title VII case, where the plaintiff has the burden to establish a prima facie case by showing prohibited employer conduct taken for the purpose of interfering with the attainment of any right to which the employee may become entitled.

And the – if the plaintiff carries their burden to establish a prima facie case, then the employer can attempt to rebut that with evidence of a legitimate nondiscriminatory reason for its challenged action.

And then the plaintiff must go forward and prove that that legitimate nondiscriminatory reason is pretext by either showing that the interference, the purposeful interference, with ERISA rights was "a" motivating factor, not "the, "a" motivating factor in the

employer's actions or that the proffered reason is unworthy of belief.

As I say, I think the plaintiffs have carried their burden both of showing – of carrying a direct evidence case and a circumstantial case. And there are my findings of fact, what I'm basing this upon.

It seems clear from the trial testimony and the deposition testimony and the documents that as early as 1995 several people were aware that this plant – perhaps even when Mr. Rossow first came in '94 – that this plant in Hendersonville was going to be shut down at some point.

The collective bargaining agreement entered into in 1997 had in it a closure benefit because – the plant closing benefits because the workers there knew already, had heard, that this plant was probably going to be closing down. And so they negotiated a plant closing benefit in that collective bargaining agreement which was to stay in effect until July of 2000.

First, Bosch laid off the third shift in July of '98, and then it formulated a plan by which it would attempt to minimize its costs of closing this plant by manipulating the date of a layoff, a substantial layoff, and the closing of the plant.

The court finds that the layoff itself in October of '99, where I believe either 63 or 69 plaintiffs were – employees were laid off, 36 of whom are plaintiffs here, for the stated reason of lack of work, that that was a 510 violation on its own.

At that time the employees were entitled to plant closing benefits. The CBA was still in effect in October of 1999.

The defense has come forward with their case for a legitimate reason that had nothing do with depriving people of benefits, but that the plaintiffs have to show here is that depriving them of benefits was "a" motivating factor, and that's what I have found that they have established.

The certainly the defendant Bosch had to go about a business process of closing down the plant which had – and that process had many moving parts. And there's lots of evidence in this record about all the moving parts that Bosch was having to consider.

And that was they were trying to phase out the 75MM engine and get their customers to agree to the D-2000 engine, which could be produced in Mexico. They had some technical problems with the new engine and therefore some problems with customer acceptance and so forth.

And so all of that played into their decision but it – but the timing of the layoff and the timing of the announcement and the timing of the closing of the plant were in part motivated by their desire to not pay closing benefits to all the persons that would have been entitled to them under the collective bargaining agreement. And the proof is abundant that that in fact was the case.

In terms of the trial testimony, I'm relying upon testimony by Ms. Duffy, who was a reluctant witness

for the plaintiffs, who is a – now an outside consultant for Bosch but at the relevant time was an employee within Bosch.

And she reluctantly testified that she felt it was an important concern minimizing the payment of benefits upon the closing of the plant, and she advised the management people about the cost of the closing benefits.

She expressed concern in having to testify in a worker's comp case about the closing. She knew that that was being kept very tight, and she was concerned about revealing that.

The testimony of Mr. Lewandowski, likewise, shows that this was a motivating factor. This – one of the most important parts of his testimony is his testimony about the moving of the layoff, and therefore the moving of the closing. And temporal proximity in these cases of circumstantial evidence of course is very important. And the temporal proximity is so suspect here because the layoff was in October of '99, and the closing was just a few weeks after a year, after 12 months, which is what did the plaintiffs out of the benefits here.

And Mr. Lewandowski testified that when they were projecting the layoff to be in June of '99, then they were projecting the closing to be in July of 2000, which is exactly just – moving it over several months, exactly the timing that they ended up with.

But probably the most straightforward – and it's the testimony of these witnesses as well as documents

that they testified about. And one of the documents Lewandowski testified about was a – it's Exhibit 131, I believe, that revealed, I believe, notes that said the 12 month benefit window dictates the date of closing.

In other words, the closing has to be more than 12 months out so that these people are deprived of their closing benefits.

But the most forthright witness on all these points was Mr. Glenn Rossow both in his deposition and in his testimony before the court.

He testified about the quote request to Towers Perrin, the benefit firm, in January of '99 where they asked for two scenarios: What if we lay off 65 or 70 workers ahead of time and then we wait and then we close, what's the difference between those two scenarios.

And of course the difference was millions of dollars, and that's what Bosch acted on.

Mr. Rossow testified that a sub-set of the production team, which was dubbed the project Flag, was concerned with minimizing the number of employees eligible for plant closing benefits and that these discussions took place both before and after the negotiation for the collective bargaining agreement.

The production team – there was a – I think what happened is that the management team simply was not educated about Section 510 of ERISA.

They knew about 502, and they wanted to adhere to the terms of the collective bargaining agreement, but they did not realize that there was a danger of manipulating these dates in such a way that they would – that it would give rise to a 510 violation.

Mr. Rossow testified that production team understood that it was okay to time things to fall outside the 12-month window to avoid paying benefits under the contract. And the defendant succeeded in doing that and avoiding a judgment in this case under 501 for the benefits, but someone forgot to think about 510.

Mr. Rossow specifically stated, "We selected the dates of the layoff, the announcement and the closing to avoid paying benefits. We gave these dates to Towers Perrin because we wanted to know the alternatives so we could seek to avoid liability." He couldn't have been plainer.

The dates were picked to exclude as many people as possible from the plant closing benefits.

And then again in his deposition testimony, Mr. Rossow was very forthright. He said that "In the summer of '97 before the collective bargaining negotiations for the '97 agreement, we had conversations concerning the need to minimize the number of employees eligible for plant closing benefits."

So this was a longstanding intent of the – of Bosch even after they put in place a collective bargaining agreement that had these plant closing benefits in it.

The production team talked about the layoff with the closing more than 12 months out. "In order to not incur these plant closing benefits, we took it into consideration in the planning that if we laid off on one date we wanted to announce and then close, that we could avoid paying these monies." Most of this the plaintiff brought out on cross of Mr. Rossow and got him to own up to what he said in his deposition, which he readily did.

He testified about the document – and I can't remember the number now – that shows – and Mr. Davis testified about this also – missing the opportunity to lay off employees.

It was talked about in terms of missing the opportunity to lay off employee so as to avoid paying these benefits.

And then Mr. Davis's deposition likewise helps establish the plaintiffs' case. Mr. Davis was on the committee. He's the director of benefits – at the time of his deposition, he's the vice-president of corporate compensation and benefits.

He testified about he testified about the Towers Perrin report and wanting that to give us the cost difference between making the layoffs versus missing the opportunity to make layoffs.

And he testified about Exhibit 64 to his deposition, an e-mail he received on August 13 of '99, where Mr. Lewandowski wrote, "To minimize the number of associates eligible for the PCPO/SERO benefits the plant must follow a rolling 12-month window,

assuming layoffs in October of '99 the earliest closing date was to be November of 2000.

And so the executives at Bosch were in fact having to do lots of planning in terms of what engines were being manufactured where, how much inventory they needed to build up in the 75MM engine so that they could transition to Mexico and getting customer acceptance and all that, all of those were factors and all of those were business matters that Bosch had to consider.

But it is impossible to view this proof as anything but establishing that also a motivating factor in all those decisions and in all the timing was the minimizing and interfering with the plant closing benefits of these workers.

In terms of the remedy here, the closure agreement carried forward the 1997 collective bargaining agreement as is in toto.

The court interprets – the schedules and the language as concerning the schedules and who was entitled and who was not entitled, the court interprets that because of the violation that happened with the layoff and the intent of Bosch in all of this timing, the schedules and the statements as to who was entitled and who was not entitled, those are really interpretations of the collective bargaining agreement of '97 which provided for these plant closing benefits which were carried forward and therefore do not foreclose in any way this Court's equitable powers to make those benefits available to these plaintiffs.

And the cases relied upon by the defendant, Great West, Bower, Adcocks and Housner (phonetic) repeatedly for the proposition that this Court can't really do anything about the closure agreement or reinstate or in-state these plaintiffs really don't apply here.

Those cases deal with the court's limited abilities when dealing with claims brought to enforce certain contracts. Here the claim is not to enforce the CBA and get benefits under 502 or to enforce a contract under Section 301 of the Labor Management Relations Act, but rather this is a claim for intentional interference with ERISA benefits under 510. And those cases do nothing to restrict the remedies available to the court in this kind of a case.

The only limitation is Section 502(a)(3), and I have already ruled that, and so those are the only limitations.

So this is the remedy that I'm going to order. And that is that the plaintiffs will be basically – I'm going to order that Bosch place these plaintiffs on the appropriate schedule, add them to the appropriate schedule of the closure agreement.

And if Bosch decides that it's throwing in the towel and not going to appeal, which I certainly do not expect, and so if – I'm going to give you a time line for that.

If – and then if Bosch does not appeal, then at this point, we will go no further in computing the benefits. I just want you to figure out what schedule they go on.

It seems to me that the computation of what the plaintiffs would be entitled to should be a fairly mechanical thing.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-6010

[Filed October 5, 2007]

NANCY ALEXANDER, ET AL.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
BOSCH AUTOMOTIVE SYSTEMS, INC.,	)
	)
Defendant-Appellant,	)
	)
UNITED AUTO WORKERS, LOCAL 2296,	)
	)
Defendant.	)
	)

BEFORE: BATCHELDER and MOORE, Circuit Judges; and COHN,* District Judge.

ORDER

* Hon. Avery Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

FILED
FEB 6 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-891

In The
Supreme Court of the United States

NANCY ALEXANDER, *et al.*,
Petitioners,

v.

BOSCH AUTOMOTIVE SYSTEMS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

GARY R. KESSLER
ANN HALE-SMITH
IRVIN & KESSLER, LLC
3500 PIEDMONT ROAD, SUITE 750
ATLANTA, GEORGIA 30305
TELEPHONE: (404) 237-1020
FACSIMILE: (404) 237-1047
GKessler@isklaw.com
AHaleSmith@isklaw.com

RANDALL A. CONSTANTINE
Counsel of Record
MAZURSKY CONSTANTINE LLC
3424 PEACHTREE ROAD
SUITE 2400
ATLANTA, GEORGIA 30326
TELEPHONE: (404) 888-8877
FACSIMILE: (404) 926-2977
RConstantine@MCBenefitsLaw.com

Counsel for Respondent

February 6, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Does ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permit a non-party to a duly negotiated and executed collective bargaining agreement to have the agreement rewritten by the trial court so as to require the payment of money damages to the Petitioners?

CORPORATE DISCLOSURE STATEMENT

The correct legal name of Respondent is Bosch Automotive Motor Systems, Inc. Respondent is a wholly owned subsidiary of Robert Bosch LLC, a Delaware limited liability company. Neither Respondent nor its parent is a publicly-traded company. No publicly-traded company owns 10% or more of Respondent's stock. Petitioners' statement in the "Parties to the Proceeding" section of Petitioners' petition for writ of certiorari (the "Petition") that Respondent is a publicly-traded corporation is incorrect.

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B. The Sixth Circuit correctly ruled that the equitable remedy of contractual reformation was inapplicable and unwarranted. 6

C. The Sixth Circuit correctly rejected characterizing the trial court's remedy as a form of equitable restitution. 7

D. Petitioners failed to exercise the viable remedy of reinstatement to employment. 7

III. *Mathews v. Chevron* Is Not Applicable To The Instant Case And, Further, Does Not Constitute A Split Of The Circuits Requiring Intervention By This Court. 8

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STATEMENT OF THE CASE

Petitioners' statement about the origins of the disputed plant-closing benefits (Petition at 3) is incorrect and misleading. The plant-closing benefits were not negotiated for the first time during the 1997 labor negotiations. The plant-closing benefits were in place when the plant was owned and operated by General Electric. Respondent inherited them when it bought the plant from GE. (Trial Tr. at 318-20.) What changed during the 1997 labor negotiations was Respondent's agreement with the UAW union[1] to define with precision when a "plant closing" would be deemed to have occurred. (*Id.* at 438-39; Trial Exh. No. 156.)

Petitioners' statement of the case amazingly omits any reference whatsoever to the collective bargaining agreement that Respondent and the UAW union negotiated during July 2000 (the "July 2000 CBA"). The omission is particularly startling since the July 2000 CBA is dispositive of all of Petitioners' claims. The disputed plant-closing benefits were a creation of the collective bargaining agreement. As such, the July 2000 CBA explicitly provided which bargaining unit employees would and which would not receive plant-closing benefits upon the closure of the plant in November 2000. (Trial Tr. at 417-29.) The schedules, which were a part of the July 2000 CBA, identified *by*

---

[1] The bargaining unit employees, including Petitioners, were represented by a local union affiliated with the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

name the employees who were eligible (Schedule 1) and not eligible (Schedule 2) for the plant-closing benefits. (*Id.*) The July 2000 CBA expressly provided that the Petitioners – each of whom was listed by name on Schedule 2 – were not eligible for plant-closing benefits. (*Id.*)

The trial court, under the purported auspices of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3),[2] rewrote the July 2000 CBA by taking the Petitioners off Schedule 2 and placing them on Schedule 1. (Appendix, Vol. II to the Petition, at 36a-37a.) In this way, the trial court hoped to give the Petitioners money damages, a purely legal remedy, in avoidance of the limitations consistently imposed by this Court on the range of remedies available under 502(a)(3). The Sixth Circuit reversed, holding that the trial court was not free to revise or manipulate the July 2000 CBA and that the trial court's remedy was not "appropriate equitable relief" under 502(a)(3). *Alexander v. Bosch Automotive Systems, Inc.*, 232 Fed. Appx. 491, 40 Employee Benefits Cas. 2245, 2007 WL 1424299 (6th Cir. May 14, 2007), Appendix, Vol. II to the Petition, at 1a-25a.

INTRODUCTION

Petitioners ask this Court to revisit yet again the issue of what constitutes "appropriate equitable relief" under 502(a)(3). Petitioners, however, have done

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[2] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), is discussed extensively in this brief. To avoid the awkward duplication of the entire parallel citation every time the statute is cited, Respondent will refer simply to "502(a)(3)."

nothing more than repackage and disguise a claim for money damages in the hope of avoiding this Court's numerous rulings that such damages – the classic form of legal relief – cannot be recovered under 502(a)(3).

Even if Petitioners were able to articulate a claim for "appropriate equitable relief," which they cannot, Petitioners' claims would still be barred by the express terms and requirements of an intervening collective bargaining agreement. The Sixth Circuit properly recognized that the trial court was without authority to modify that collective bargaining agreement, which barred Petitioners' claims, whatever the outcome of their 502(a)(3) claim.

REASONS THE PETITION SHOULD BE DENIED

I. The Sixth Circuit's Opinion Is Not At Odds With *Varity*.

Petitioners attempt to create a conflict between the Sixth Circuit's opinion in this action and this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), by arguing that *Varity* held "that a reinstatement to benefits is appropriate relief under Section 502(a)(3)." (Petition at 11.)

Petitioners misrepresent *Varity*. The *Varity* Court did not conclude that reinstatement to benefits constituted "appropriate equitable relief" under 502(a)(3). The issue was never considered by the

Court because the appropriateness of the remedy had been conceded by the parties.[3]

The *Varity* Court considered only three questions: (1) whether, under the particular facts presented, the employer was acting in a fiduciary capacity; (2) whether the employer breached its fiduciary obligations; and (3) whether under 502(a)(3) plan beneficiaries could obtain individual relief (as opposed to relief to the plan as a whole, *see Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)). 516 U.S. at 492. Nowhere did the Court address whether the specific relief sought by the plaintiffs and ordered by the trial court was "appropriate equitable relief" under 502(a)(3).[4]

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[3] "Varity concedes that the plaintiffs satisfy most of [502(a)(3)]'s requirements, namely, that ... they are suing for 'equitable' relief to 'redress' a violation of ... a 'provision of this title.'" 516 U.S. at 508.

[4] Petitioners have doggedly misconstrued this Court's holding in *Varity* throughout these proceedings. Having noted that the *Varity* Court permitted a beneficiary to sue for individual relief under 502(a)(3), Petitioners leap to the unsubstantiated conclusion that *a fortiori* this Court must have approved the specific *type* of individual relief the plaintiffs could seek. The Court made no such leap in *Varity*.

II. This Case Is Inappropriate For Certiorari Because Numerous Insurmountable Obstacles Would Prevent This Court From Reaching The 502(a)(3) Issue.

The trial court revised the July 2000 CBA to require the payment of money damages to Petitioners. The trial court attempted to square this result with the limitations of 502(a)(3) by characterizing its remedy as a form of equitable reinstatement. In reality, what the trial court ordered was nothing less than a complete judicial abrogation of the July 2000 CBA between Respondent and the UAW union.

Petitioners argue that the instant "case provides an excellent alternative case for the Court to decide" the 502(a)(3) issue. (Petition at 17.) In fact, numerous defects in the trial court's logic and the Petitioners' claims will prevent this Court from ever reaching the 502(a)(3) issue presented by Petitioners.

A. The Sixth Circuit correctly found that the trial court mischaracterized its remedy.

The Sixth Circuit first scrutinized the trial court's characterization of its remedy as "equitable reinstatement." (Appendix, Vol. II to the Petition, at 12a.) Noting that "reinstatement" is considered an equitable remedy only in the context of unlawful employment termination and allows only reinstatement to employment, the Sixth Circuit noted further that reinstatement was not even a possibility in the instant case because the plant had already closed before Petitioners filed their complaint. (*Id.* at

12a-14a.) In any event, the trial court clearly did not reinstate the Petitioners to employment.

Rejecting the trial court's characterization of its remedy, the Sixth Circuit concluded that the trial court had really "instated," not reinstated, Petitioners. Because the Petitioners were never entitled to the disputed benefits, it was impossible to "reinstate" them to those benefits. (*Id.* at 14a.)

B. The Sixth Circuit correctly ruled that the equitable remedy of contractual reformation was inapplicable and unwarranted.

Having rejected the trial court's characterization of its remedy, the Sixth Circuit recognized that the trial court's remedy – rewriting the July 2000 CBA – was "more like the remedy of contractual reformation." (*Id.*) The appeals court recognized that reformation is only "available where the parties to a contract reached a valid agreement, but that mutually agreed-upon understanding was inadequately, mistakenly, or fraudulently conveyed in writing." (*Id.* at 15a-16a (citations omitted).) Neither Petitioners nor any other party has ever contended these circumstances were present in the instant case. (*Id.* at 16a-17a.)

The Sixth Circuit properly concluded that the July 2000 CBA accurately reflected the contracting parties' understanding and thus was not a proper candidate for the equitable remedy of reformation, since it is well-established that "reformation may not be used to foist upon the parties a contract they never made." (*Id.* at 17a (citations omitted).) The Sixth Circuit also

recognized that the trial court could not reform the July 2000 CBA for a second, equally compelling reason: except under very limited circumstances not present here, federal courts are without authority to abrogate or modify collective bargaining agreements duly negotiated within the framework of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* (*Id.* at 17a-19a.)

C. The Sixth Circuit correctly rejected characterizing the trial court's remedy as a form of equitable restitution.

The Sixth Circuit then examined whether any other type of appropriate equitable relief might be available, including equitable restitution. The appeals court found none and rejected equitable restitution as an available remedy based on this Court's teachings in *Great-West*[5] and *Sereboff*,[6] finding that at best Petitioners' claim could be characterized as legal, not equitable, restitution. (*Id.* at 19a-22a.)

D. Petitioners failed to exercise the viable remedy of reinstatement to employment.

Contrary to Petitioners' argument, the Sixth Circuit noted that Petitioners had a viable remedy

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[5] *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

[6] *Sereboff v. Mid Atlantic Med. Servs. Inc.*, 547 U.S. 356 (2006).

under 502(a)(3). (*Id.* at 24a.) They could have filed suit before the plant was closed, sought reinstatement of employment (recall to their former positions), and qualified for plant-closing benefits under the applicable collective bargaining agreement. By waiting to file suit until two months after the plant closed, notwithstanding adequate advance notice of what was to come, the Petitioners elected not to avail themselves of this available remedy. Thus, Petitioners' real complaint is not that they were completely without a remedy, but that, due solely to their own delay, they are now left without the money damages remedy they sought under 502(a)(3).

III. *Mathews v. Chevron* Is Not Applicable To The Instant Case And, Further, Does Not Constitute A Split Of The Circuits Requiring Intervention By This Court.

No more than a brief word about Petitioners' contentions regarding *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), is warranted. The Ninth Circuit in *Mathews* affirmed a 502(a)(3) remedy ordering the employer/fiduciary to amend certain plan records. Critical to the court's conclusion in *Mathews* was its recognition that the record amendment would not guarantee benefits. In contrast, the revisions to the July 2000 CBA ordered here guaranteed benefits and had the direct (and intended) consequence of awarding money damages to the Petitioners. Further, unlike *Mathews*, the trial court here rewrote a collective bargaining agreement in violation of applicable labor law separate and apart from ERISA. Thus, *Mathews* is not relevant to the Sixth Circuit's analysis here. It would be inappropriate to address

any alleged split in the circuits created by *Mathews* in a case to which *Mathews* is not applicable.

Even if *Mathews* were relevant here, which it is not, its anomalies are of insufficient magnitude to create a split in the circuits requiring intervention by this Court. According to Westlaw's KeyCite function as of the day of this writing, the remedy holding in *Mathews* has garnered four negative and no positive citing references. This lone opinion, generally disregarded by other circuits considering the issue, does not create a "circuit split." Even if it could be considered a "circuit split," the "split" is not mature enough, nor have competing ideologies been sufficiently fleshed out, to resolve it on the back of the instant case. Moreover, the Sixth Circuit's rejection of the reasoning in *Mathews* as unpersuasive was correct and hardly offers a compelling reason for granting the Petition in this case.

IV. This Court's Decision To Grant Certiorari In *LaRue* Is Not Relevant To, And Provides No Basis For Granting, The Instant Petition.

Citing this Court's decision to grant certiorari in *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 127 S. Ct. 2971 (2007), Petitioners argue that "[t]o the extent that the Court does not decide the Section 502(a)(3) issue presented in *LaRue*, this case provides an excellent alternative case for the Court to decide that issue." (Petition at 17.)

The focus of *LaRue* was an issue involving remedies under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). As

demonstrated during oral argument in *LaRue*, the case may also impact the scope of remedies under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The remedy issue under 502(a)(3) was at best a secondary issue thrown in as an afterthought.

The remedy issue under 502(a)(3) is well settled in this Court. The Court's granting certiorari in *LaRue* does not imply that the Court has any interest in revisiting the issue yet again.

Even if this Court were interested in revisiting the 502(a)(3) remedy issue, for the reasons outlined above, this case is not the appropriate vehicle for doing so.

CONCLUSION

The law applicable to this case is settled. Petitioners have not established any compelling reason for this Court to grant their Petition. Respondent prays that the Court deny the Petition.

Respectfully submitted,

RANDALL A. CONSTANTINE
(*Counsel of Record*)
MAZURSKY CONSTANTINE LLC
3424 Peachtree Road, Suite 2400
Atlanta, Georgia 30326
Telephone: (404) 888-8877
Facsimile: (404) 926-2977
RConstantine@MCBenefitsLaw.com

GARY R. KESSLER
ANN HALE-SMITH
IRVIN & KESSLER, LLC
3500 Piedmont Road, Suite 750
Atlanta, Georgia 30305
Telephone: (404) 237-1020
Facsimile: (404) 237-1047
GKessler@isklaw.com
AHaleSmith@isklaw.com

Counsel for Respondent

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No. 07-891

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In The

Supreme Court of the United States

NANCY ALEXANDER, et al.,
Petitioners,

v.

BOSCH AUTOMOTIVE SYSTEMS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

C. Mark Pickrell
Counsel of Record
Waller Lansden Dortch
& Davis, LLP
511 Union Street; Suite 2700
Nashville, TN 37219
(615) 850-8913

Counsel for Petitioners

June 17, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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1. The Court has already decided a case, *Varity Corp. v. Howe*, involving the propriety of a reinstatement-to-benefits remedy, implicating the principle of *stare decisis* in a way that is not present in *Amschwand*. 2

2. The remedies involved in *Amschwand* and this case have different historical foundations, which may affect the Court's interpretation of Congress' intent in Section 502(a)(3). 4

3. Deciding this case and *Amschwand* together should result in a superior, more relevant and applicable, decision by the Court. 5

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ARGUMENT

I. THE COURT SHOULD CONSIDER THIS CASE ON THE MERITS, POSSIBLY IN CONJUNCTION WITH *AMSCHWAND v. SPHERION CORP., et al.*, No. 07-841.

This case involves the question of whether Section 502(a)(3) of ERISA authorizes a district court to reinstate an employee to plan benefits when an employer violates ERISA (specifically, in this case, the non-discrimination provisions of Section 510 of ERISA). The petitioners filed their petition on January 3, 2008. In the petition, the petitioners requested that the Court grant the petition and decide this case on the merits or, in the alternative, to grant the petition and remand to the Court of Appeals upon a relevant decision in *LaRue v. DeWolff, Broberg & Assoc.*, No. 06-856. Since that date, the Court has decided *LaRue* on grounds unrelated to the issues presented in this case, *LaRue*, 128 S. Ct. 1020 (2008), and the Court has requested that the Solicitor General submit a brief regarding the propriety of issuance of the writ in *Amschwand v. Spherion Corp., et al.*, No. 07-841, which contains an issue presented that is similar to the issue raised in this case. Because of the developments in the Court since the petition was submitted, this supplemental brief is submitted pursuant to Rule 15.8.

The petitioners respectfully submit that the Court should issue the writ in this case for a decision on the merits. This case and *Amschwand* each involve similar concerns: when may a district court under Section 502(a)(3) of ERISA grant a remedy that costs

a defendant money? But *Amschwand*, like *LaRue*, is concerned with the remedy known as "surcharge," whereas this case concerns the remedy of "reinstatement-to-benefits" and a different split among the Courts of Appeals. While each remedy is similar, because they require the expenditure of money by defendants, there are differences in the development of the law with regard to each type of remedy that should aid the Court in clarifying the correct interpretation of Section 502(a)(3).

1. The Court has already decided a case, *Varity Corp. v. Howe*, involving the propriety of a reinstatement-to-benefits remedy, implicating the principle of *stare decisis* in a way that is not present in *Amschwand*.

In their petition, the petitioners in this case respectfully submitted that the Court has already decided a case, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), holding that a reinstatement-to-benefits remedy is "appropriate equitable relief" under Section 502(a)(3). Petition at 10. The Solicitor General, in support of the petition in *Amschwand*, supports that reading of the Court's prior decision:

> [I]n *Varity Corp.*, 516 U.S. at 512, the Court stated that Section 502(a)(3) is a "catchall" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Based on that understanding the Court held that Section 502(a)(3) authorized the reinstatement of the plaintiff employees to a

> plan that they had been tricked into leaving by the plan fiduciary.

Brief of the Solicitor General in *Amschwand*, No. 07-841, at 10, n. 3.

In contrast, the Court has not decided a case to date involving the "surcharge" remedy, as was presented in *LaRue* and now is present in *Amschwand*. For that reason, the surcharge cases have, in the Courts of Appeals, focused on the application of *Mertens v. Hewitt Assocs.*, 508 U.S. 249 (1993), and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), to the "surcharge" remedy, whereas the reinstatement-to-benefits cases (*Mathews v. Chevron*, 362 F.3d 1172 (9th Cir. 2004)[1], and this case) have focused on the proper interpretation of *Varity Corp.* By taking this case, whether alone or in conjunction with *Amschwand*, the Court can clarify the proper interpretation of Section 502(a)(3) by specifically considering the principle of *stare decisis*.

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[1] Probably because that case does not involve the "surcharge" remedy, the Solicitor General did not cite the Ninth Circuit's decision in *Mathews* in his brief in support of certiorari in *Amschwand*. Regardless of whether the Court decides to grant certiorari in *Amschwand*, the clear split between the Ninth Circuit in *Mathews* and the Sixth Circuit in this case, regarding the current availability of the reinstatement-to-benefits remedy, remains stark.

2. The remedies involved in *Amschwand* and this case have different historical foundations, which may affect the Court's interpretation of Congress' intent in Section 502(a)(3).

This case involves not just the principle of *stare decisis* but an examination of the principles of basic equity jurisprudence.

The arguments regarding the propriety of "surcharge" under Section 502(a)(3) are strongly tied to arguments regarding legal history: was "surcharge" a remedy that was "historically available to a court of equity." See *Amschwand*, No. 07-841, Brief of the Solicitor General in Support of the Petition at 10-15. The propriety of the remedy of reinstatement-to-benefits, however, requires an examination of the application of *principles of equity* -- such as, "Equity will not suffer a wrong without a remedy." *Cf.*, *Varity Corp. v. Howe*, 516 U.S. at 515, "We are not aware of any ERISA-related purpose that a denial of a remedy would serve."

If this Court were to only examine the propriety of "surcharge" under Section 502(a)(3), then the argument may tend to focus solely on a legal formalism: "Is this remedy one that the plaintiff can explicitly point to in an old equity treatise?" With the reinstatement-to-benefits remedy presented in this case, in contrast, the Court will necessarily confront the question of how historically rigid it will define, and constrain, Congress' use of the term "equitable relief." Because, ultimately, the question in these cases is one of determining Congress' intent in Section 502(a)(3),

the petitioners respectfully submit that the full range of options that Congress could have meant in Section 502(a)(3) -- including a fuller view of equity jurisprudence -- is specifically presented in this case for the Court's consideration.

3. Deciding this case and *Amschwand* together should result in a superior, more relevant and applicable, decision by the Court.

By hearing *Amschwand* and this case together, the Court will be able to provide superior clarification of the proper interpretation of Section 502(a)(3). The Court's consideration and explanation of all of the Court's 502(a)(3) cases, including specifically *Varity Corp.* as well as *Mertens* and *Great-West*, will provide greater clarity in the law. (It will certainly clarify the remaining viability, if any, of *Varity Corp.*) Furthermore, by examining these two different remedies, which have very different legal foundations and histories, the Court's ultimate decision will be broader and more applicable to future cases. By being rooted in two different, yet very clear, remedies and factual situations, the reach of the Court's ultimate interpretation of Section 502(a)(3) will be clearer, and easier to apply by the lower courts.

CONCLUSION

Review of this case will permit the Court to consider the application of the principle of *stare decisis* when interpreting Congress' intent in Section 502(a)(3). This case will also provide the Court the opportunity to examine Congress' use of the phrase "other appropriate equitable relief" in Section 502(a)(3) in the context of a broader view of equity jurisprudence, and it will allow the Court to issue a broader, yet more applicable and specific, interpretation of Section 502(a)(3). For these reasons, as well as the reasons in the Petition and Reply Brief, the petition for writ of certiorari should be granted. The writ should issue, and the Court should resolve the split among the courts of appeals regarding the reinstatement-to-benefits remedy under Section 502(a)(3) by deciding this case on the merits, possibly in conjunction with *Amschwand*. In the alternative, and to the extent that the Court clarifies the proper interpretation of Section 502(a)(3) in *Amschwand*, the Court should issue the writ, vacate the judgment below, and remand this case to the court of appeals for reconsideration in light of *Amschwand*. In either event, the petition should be granted.

Respectfully submitted.

C. Mark Pickrell
Counsel of Record
Tanielle Henriques
Alyssa Leffall
Waller Lansden Dortch & Davis, LLP
511 Union Street; Suite 2700
Nashville, TN 37219
(615) 850-8913

Kevin Sharp
Drescher & Sharp, P.C.
1720 West End Avenue; Suite 300
Nashville, TN 37203

Joseph Y. Longmire
103 Bluegrass Commons Blvd.
Hendersonville, TN 37075

Larry D. Wilks
509 West Court Square
Springfield, TN 37172

No. 07-891

2-15-08

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PETITIONER'S REPLY BRIEF

C. Mark Pickrell
Counsel of Record
Waller Lansden Dortch
& Davis, LLP
511 Union Street; Suite 2700
Nashville, TN 37219
(615) 850-8913

Counsel for Petitioners

February 15, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

STATEMENT REGARDING THE PARTIES TO THE PROCEEDING

In its Brief in Opposition, the Respondent states, "The correct legal name of Respondent is Bosch Automotive Motor Systems, Inc. . . . Neither Respondent nor its parent is a publicly-traded company."

To avoid any investment conflict: Bosch Corporation is a publicly-traded stock in Germany, trading in Germany under the name (translated into English) "Bosch Automotive Systems, Inc." In 2000, Zexel Corp. merged into the Bosch Group of companies and was renamed, in English, "Bosch Automotive Systems, Inc." Following that merger, "Bosch Automotive Systems, Inc." is still publicly traded in Germany under the symbols ZEX.BE, ZEX.MU, ZEX.F, and ZEX.DE, depending on whether the stock is traded on the Berlin, Munich, Frankfurt, or Germany-wide markets.

It should be noted that Bosch's attorneys signed their pleadings in the district court below as "Attorneys for Bosch Automotive Systems, Inc." and in the appellate court as "Attorneys for Appellant Bosch Automotive Systems."

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ARGUMENT

I. THE COURT WAS ABUNDANTLY CLEAR REGARDING THE ISSUE PRESENTED IN *VARITY CORP. v. HOWE.*

In its Brief in Opposition, the Respondent writes, "Petitioners misrepresent *Varity*. The *Varity* Court did not conclude that reinstatement to benefits constituted 'appropriate equitable relief' under 502(a)(3). The issue was never considered by the Court because the appropriateness of the remedy had been conceded by the parties." Brief in Opposition at 3-4. In support of this argument, the Respondent quotes the Court from *Varity*: "'Varity conceded that the plaintiffs satisfy most of [502(a)(3)]'s requirements, namely, that . . . they are suing for 'equitable relief' to 'redress' a violation of . . . a 'provision of this title.' 516 U.S. at 508. Brief in Opposition at 4, n. 3 (bracket added by Respondent for clarity).

The Respondent's argument regarding the reach of this Court's decision in *Varity Corp.*, 516 U.S. 489 (1996), is belied by a single sentence in *Varity Corp.*, which was omitted from Respondent's "supporting" quotation. In its quotation of the Court from *Varity Corp.*, Respondent omitted the Court's very next sentence, in which the Court explained: "Varity does not agree, however, that this lawsuit seeks equitable relief that is 'appropriate.'" 516 U.S. at 508. As should be clear from the Court's <u>full</u> quotation, it is undeniable that the Court in *Varity Corp.* did confront, to use the words of the Respondent, "the appropriateness of the remedy" of reinstatement to benefits under ERISA.

Based on the numerous statements of the Court (quoted in the Petition at 11-13) in *Varity Corp.*, outlining the issue presented and the holding of the Court in that case, and based on the Court's simple explanation of the argument made by Varity Corporation, which the Respondent has inexplicably truncated in its Brief in Opposition, the Court was clearly confronted in *Varity Corp.* with the question of whether reinstatement to benefits is an appropriate form of relief under ERISA. The Court directly held -- contra to the decision of the court of appeals below -- that reinstatement to benefits is an appropriate ERISA remedy. *Varity Corp.*, 516 U.S. at 508, 515.

II. THE NINTH'S CIRCUIT'S DECISION IN *MATHEWS v. CHEVRON* IS CLEARLY IN CONFLICT WITH THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE.

In its Brief in Opposition, the Respondent considers the Ninth Circuit's decision *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), to "warrant" no more than "a brief word." Brief in Opposition at 8. The Respondent then, without citation, asserts that the Ninth Circuit in *Mathews* merely "affirmed a 502(a)(3) remedy ordering the employer/fiduciary to amend certain plan records." And, "Critical to the court's conclusion in *Mathews* was its recognition that the record amendment would not guarantee benefits." *Id.*

The Respondent's unsupported statements regarding the Ninth Circuit's decision in *Mathews* are completely contradicted by the actual words of the Ninth Circuit. The Ninth Circuit did not merely affirm an order that Chevron "amend certain plan records,"

nor did the Ninth Circuit ever "recognize" that Chevron's compelled actions "would not guarantee benefits." Instead, in *Mathews*, the Ninth Circuit required that Chevron amend its plan's records specifically "to ensure that [the plaintiffs] are provided the SITE benefit in accordance with said change." *Mathews*, 362 F.3d at 1186.

The Respondent's treatment of the split between the Sixth Circuit in this case and the Ninth Circuit in *Mathews* is noticeably meager, and curious, in light of the Respondent's encomiums for the Sixth Circuit's view that the district court's remedy in this case was "instatement to benefits" not "reinstatement to benefits." See Brief in Opposition at 6. In *Mathews*, the Ninth Circuit, relying on the Court's decision in *Varity Corp.*, specifically concluded, "If 'reinstating' employees into a plan constitutes 'appropriate equitable relief,' there is no reason to conclude that 'instating' them would not." *Mathews*, 362 F.3d at 1186. The division between the Sixth Circuit and the Ninth Circuit on this issue could not be clearer.

Finally, the Respondent's effort to minimize the Ninth Circuit's decision in *Mathews*, by describing Respondent's Westlaw search results and characterizing the Ninth Circuit's decision as a "lone opinion" that "does not create a 'circuit split,'" Brief in Opposition at 9, is notable for another omission by Respondent. In the Petition, Petitioners cite the Third Circuit's decision, *Leckey v. Stefano*, 501 F.3d 212 (3rd Cir. 2007), along with *Mathews*, as examples of one side of the split among the courts of appeals regarding the proper remedies available under Section 502(a)(3). Petition at 15. (In *Leckey*, 501 F.3d at 230, the Third

Circuit held that remand to the district court in that case was appropriate because "equitable relief in the form of a constructive trust is available" to ERISA plaintiffs under 502(a)(3), even though such a remedy would necessarily require the payment of money to the plaintiffs.) The Respondent's effort to minimize the clear split between the decision of the Sixth Circuit in this case and the Ninth Circuit in *Mathews* is, unfortunately, bolstered only by Respondent's failure to mention or discuss the Third Circuit's *Leckey* decision. The Third Circuit's decision is in agreement with the Ninth Circuit's decision in *Mathews*, and the conflict between the Third & Ninth Circuits and the other courts of appeals, discussed in the Petition at 13-15, is palpable. The disagreement among the courts of appeals regarding the remedies available under 502(a)(3) is certainly not the product of a "lone opinion."

III. THE COURT'S GRANT OF CERTIORARI TO REVIEW THE 502(a)(3) ISSUE IN *LARUE* WAS HARDLY AN AFTERTHOUGHT.

Respondent argues that the Court's pending decision in *LaRue v. DeWolff, Boberg & Assoc., Inc.*, is "not relevant to" the Petition in this case. Brief in Opposition at 9. In support of that assertion, Respondent argues that "the focus" of the Court in *LaRue* is the Section 502(a)(2) issued presented in that case. *Id.* Respondent then asserts, again without argument, support, or citation, that the 502(a)(3) issue that the Court also granted certiorari on in *LaRue* "was at best a secondary issue thrown in as an afterthought." *Id.* at 10.

Respectfully, the Petitioners do not believe that the Court thoughtlessly "threw in" issues into its grant of certiorari in *LaRue*. Instead, it appears to Petitioners that the Court granted certiorari to review the 502(a)(3) issue in *LaRue* precisely because the Court deemed that issue worthy of review, particularly to resolve the existing division among the courts of appeals and/or to clarify the apparent discrepancy between the Court's decisions in *Varity Corp.* and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

As discussed in the Petition, the Court may not reach the 502(a)(3) issue presented in *LaRue*. To the extent that the Court deems it inappropriate, in *LaRue*, to resolve the current circuit split and clarify the remedies available under 502(a)(3), this case provides an excellent opportunity for the Court to clarify the correct interpretation of 502(a)(3). Moreover, this case is a particularly good case to resolve any conflict between *Varity Corp.* and *Great-West*, because the remedy in this case is the same as in *Varity Corp.* Resolution of this case will let courts, counselors, commentators, and Congress know whether *Great-West* actually effected a reinterpretation of 502(a)(3).

CONCLUSION

The petition for writ of certiorari should be granted. The writ should issue, and the Court should resolve the split among the courts of appeals by deciding this case on the merits. In the alternative, and to the extent that the Court clarifies the proper interpretation of Section 502(a)(3) in *LaRue*, the Court

should issue the writ, vacate the judgment below, and remand this case to the court of appeals for reconsideration in light of *LaRue*. In either event, the petition should be granted.

Respectfully submitted.

C. Mark Pickrell
Counsel of Record
Tanielle Henriques
Alyssa Leffall
Waller Lansden Dortch & Davis, LLP
511 Union Street; Suite 2700
Nashville, TN 37219
(615) 850-8913

Kevin Sharp
Drescher & Sharp, P.C.
1720 West End Avenue; Suite 300
Nashville, TN 37203

Joseph Y. Longmire
103 Bluegrass Commons Blvd.
Hendersonville, TN 37075

Larry D. Wilks
509 West Court Square
Springfield, TN 37172